LAW AND CONTEMPORARY PROBLEMS

PRICE DISCRIMINATION AND PRICE CUTTING

(TABLE OF CONTENTS ON INSIDE COVER)

SCHOOL OF LAW • DUKE UNIVERSITY

VOL. IV JUNE, 1937 No. 3

LAW AND CONTEMPORARY PROBLEMS

A QUARTERLY PUBLISHED BY THE DUKE UNIVERSITY SCHOOL OF LAW

PROFESSOR DAVID F. CAVERS, Editor

PUBLICATION BOARD: Professor L. L. Fuller, Dean H. C. Horack, Professor Malcolm McDermott

VOLUME IV — JUNE, 1937 — NUMBER 3

CONTENTS

PRICE DISCRIMINATION AND PRICE CUTTING

MONTHS OF ISSUE: JANUARY, APRIL, JUNE, AND OCTOBER

Subscription Price, $2.50 per Annum — Foreign Subscriptions, $3.00 — $1.00 per Number

(A supply of copies of each issue is provided to fill orders for single numbers)

Address all communications to LAW AND CONTEMPORARY PROBLEMS
DUKE STATION, DURHAM, NORTH CAROLINA

Entered as second-class matter, October 27, 1934, at the post office at Durham, North Carolina, under the Act of March 3, 1879.

LAW AND CONTEMPORARY PROBLEMS

VOLUME IV JUNE, 1937 NUMBER 3

FOREWORD

Within recent years it has grown apparent that economic necessity is mothering a new ethic of competition. The privilege of buyer and seller to strike their bargain at the price dictated by their respective exigencies is becoming qualified by a new conception of fair dealing. To favor the large buyer as against the small, to sell trademarked goods at a price below that approved by their producer, to cut prices of goods below their cost to the seller, these are the practices, long commonplaces of competitive business, which are coming to be classed with chicane and fraud as beyond the pale of ethical tolerance. Moreover, under the pressure of depression, this emerging ethic has suddenly gained legal sanction. A year ago, with the enactment of the Robinson-Patman Act, the Congress shook the law against price discrimination from its twenty years of fitful slumber in the federal statute books, and drastically extended its provisions. During the past winter nearly a score of states joined the baker's dozen which within the preceding few years had abolished the judge-made restrictions against resale price maintenance. Ten states have sought to keep alive by statute the prohibitions against sales below cost which had flowered briefly in the N.R.A. codes.

Whatever the fate of these particular measures at the hands of enforcement agencies and courts—and, more important still, of business itself—it seems clear that the discontent which they evidence is not ephemeral. The depression is receding but those disparities in bargaining power and those developments in marketing methods which gave rise to this discontent will not disappear. It is the probability that we are witnessing not the culmination, but the inception, of a campaign aimed at governmental control over pricing practices that affords justification for an inquiry into some of the varied problems which are posed by, or lie beneath, this recent wave of legislation.

To place the new measures in the historical sequence of governmental controls over price in this country is the task of the first article in the symposium. The second deals with the relationship of the new laws, and especially the Robinson-Patman Act, to the body of anti-trust laws which antedated them. Since much of the recent legislation is premised on the assumption that cost affords a standard by which the rectitude of pricing may be judged, the necessity for an inquiry into the

concept of "cost" and its relation to price becomes manifest. This is undertaken in the fourth article in which the inquiry leads to an examination of the function of the accountant. The assumption is challenged in the fifth article which is also directed to a consideration of the difficulties in the path of price discrimination control arising out of that redistribution of marketing functions which itself has done so much to inspire the demand for control. Appended to this article is a suggested revision of the Robinson-Patman Act.

Since the efficacy of price controls at earlier stages of the distributive process must ultimately be tested in the retail market, an appraisal of the significance of restrictions upon price competition must include a consideration of the importance, in the quest for the consumer's dollar, of non-price forms of competition: product differentiation and improvement, special services, advertising, and the like. The relation of these forms of competition to the proposed controls is analyzed in the sixth article. The seventh gives specification to this analysis by a depiction of those factors in the bargain which are not embraced in the quoted price, a discussion which, though focused upon the retail sale, is also relevant to the wholesale transaction.

The last three articles are devoted to a consideration of public and judicial attitudes, forces which inevitably condition the life history of law in the statute books. The first of these articles discusses the group attitudes in those branches of the distributive trades from which has come the most insistent demand for resale price maintenance and the prohibition of the "loss leader" and on whose continued cooperation the success of laws to these ends must depend. The next article depicts the reactions of the business world to the Robinson-Patman Act. The final article notes the judicial treatment of laws regulating business practice and examines the possibilities for the strict construction of that Act as it runs the gauntlet of the courts.

The reader will find in this symposium a range of opinion toward the measures under consideration which runs from approval "in principle," tempered by doubt, to forthright condemnation. He should not, however, infer that this legislation has no warmer advocates among students of trade regulation or that more cannot be said in its behalf than is set forth herein. But the proponents have presented their case; their immediate legislative objectives have been attained. While awaiting the verdict of experience, it may not be amiss to ponder some of the implications of that victory as viewed by those who have not enlisted as partisans in the victors' camp.

D. F. C.

PRICE CONTROL BY LAW IN THE UNITED STATES: A SURVEY

Breck P. McAllister*

The ways in which the activities of government may influence prices are so many and diverse that only an arbitrary line will serve to set apart methods of more or less direct control for separate treatment. A tariff may have objectives of protection, or revenue, or both, but it is undeniable that it has important and recognized effects on a given price structure. Policies of government in the realm of currency and public finance may be undertaken with or without thought to prices. Here too the market place may prove to be an all too sensitive barometer. Tax measures may have their repercussions on what the consumer must pay for goods and often they are shaped with full awareness of this. Subsidies and bounties and other measures to encourage and facilitate trade and industry may seem to have little to do with prices but they do reflect the public interest in bearing a share of the cost of rendering a given service. When we come to the regulatory measures of recent decades the effect on prices seems plain enough. The Supreme Court saw this clearly enough in a case involving a workman's compensation act when it declared that the act requires that "the losses shall be reckoned as a part of the cost of the industry just like the pay roll, the repair account or any other item of cost."[1] The same may be said with varying force of laws regulating the quality and standards of goods, hours of labor, minimum wages, social security and the like. It is not to be supposed that government is unaware of the economic cost of its measures. The insistence of government must be taken to be a choice between competing social and economic values.

There are many instances in which government acts with its eye directly fixed on the forces that play on the market place and attempts to influence price by putting the weight of its power on one or more of them, if not on price itself. Economic man—he whose acts for his own good bestow good on all, so the story runs—is out of hand. His conduct must be conditioned by new forces. Government steps in to attempt to supply them. He may be so unruly that it is feared he will not perform

* A.B., 1923, University of California; LL.B., 1926, Harvard University; Ph.D., 1929, Robert Brookings Graduate School. Member of the New York and District of Columbia Bars. Associate Professor of Law, University of Washington. Special Assistant to the Attorney General, Anti-Trust Division, Department of Justice, Washington, D. C., 1927-1929; practice in the field of anti-trust law with the firm of William J. Donovan, New York City, 1929-1933. Contributor to legal periodicals on subjects relating to trade regulation.

[1] Mountain Timber Co. v. Washington, 243 U. S. 219, 243 (1917).

according to the story and so government deals directly with price. There are various other measures, too, that may be employed and, in the United States, government generally has been content to stay its hand from direct control, important as are the instances of its exercise, and to attempt rather to deal with other forces. It is proposed here to review the story of the efforts of government along these lines in the history of the United States. The primary concern will be with the measures that have been employed as instruments of control and the economic, social and political forces that have brought them about.

I. THE REVOLUTIONARY YEARS

Price fixing laws of the revolutionary years may seem to belong to the remote past but the fact is that for a time during those years prices of nearly every article in general use, as well as the wages of labor, were fixed by most of the state legislatures.[2] This fact is a part of our heritage of governmental action and as such warrants mention. The outbreak of the armed conflict and the activities of the makeshift Continental Congress sent prices up. Without either a national treasury or national credit and without power to levy taxes the Continental Congress undertook to furnish the sinews of a successful revolution by the issuance of paper money and the states did likewise. The states were supposed to redeem it by the use of their taxing powers but taxation was a delicate matter at that time. The result during this period was chaos in commercial transactions and in the market place. The paper money fell in value until the expression "not worth a Continental" came to be the epithet of the day. Unable or unwilling to deal with the disease the states attempted to deal with the most apparent symptoms. Prices were out of hand and so they sought to control them.

For some five years, from 1776 to 1781, this effort was made. As an organized movement it dates from a meeting of delegates from Massachusetts, New Hampshire, Rhode Island and Connecticut held at Providence in December, 1776. This meeting adopted an elaborate schedule of prices covering substantially everything in use at the time and recommended its adoption by the states. The Continental Congress gave its full approval and added its recommendation. The states were not slow to act. By January of 1777 the four states represented at Providence had written the schedule into their laws[3] and before the year was out Maine,[4] Maryland,[5]

[2] BOLLES, FINANCIAL HISTORY OF THE UNITED STATES, FROM 1774 TO 1789 (2d ed. 1884) cc. IX, XII; Davis, *The Limitation of Prices in Massachusetts, 1776-1779*, in 10 PUBLICATIONS OF THE COLONIAL SOCIETY OF MASSACHUSETTS (1907) 119; Harlow, *Economic Conditions in Massachusetts during the American Revolution* in 20 PUBLICATIONS OF THE COLONIAL SOCIETY OF MASSACHUSETTS (1920) 163; Jones, *Historical Development of the Law of Business Competition* (1926) 36 YALE L. J. 42, 52; U. S. DEP'T AGRIC., BUR. AGRIC. ECON., BIBLIOGRAPHY No. 18, *Price Fixing by Governments, 424 B.C.—1926 A.D.* (1926) 18 *et seq.*

[3] Price control statutes passed by the states during the revolutionary war are collected in CLARK, EMERGENCY LEGISLATION TO DECEMBER, 1917 (U. S. Dep't Just. 1918) 228-990. Massachusetts, Act of Jan. 25, 1777, *id.* at 420 and amending act of the same year, *id.* at 429. Both were repealed later in the year, *id.* at 439. The Massachusetts laws are discussed in Davis, *supra* note 2. New Hampshire, Act of Jan. 18, 1777, CLARK, *op. cit. supra* at 466, as amended by Act of April 10, 1777, *id.* at 471. Both acts were repealed by the Act of Nov. 27, 1777, *id.* at 476. Rhode Island, Act of Dec., 1776, *id.* at 823,

Pennsylvania,[6] and New Jersey[7] had done likewise. New York followed in 1778.[8] During the ensuing years there were other meetings, other resolves and other schedules of prices. In some states the laws were short lived, in others they were more lasting, but in all there was deep concern about the matter.[9] As late as November of 1779 the Continental Congress again urged the states to establish by law general limitations of prices. A troublesome matter had been the difficulty of securing uniform action by all the states. Town was pitted against farm and everywhere the patriotic utterances of the revolutionary years were mingled with denunciations of monopoly, greed and avarice. A variety of legislation was passed. Laws against forestalling and engrossing, so well known in England, found their way to the statute books in nearly every state.[10] Appeals to patriotism were joined with laws making it a criminal offense to refuse to accept the Continental bills. In many states barter was resorted to by the people.

Both the Congress and the states were caught in the web of the prevailing paper money policy. Every effort was being made to give it currency in the markets in payment for goods and as legal tender in payment of debts and taxes. The price-fixing laws were but a part of this effort but like the other measures they failed in their objective. They were generally disregarded and as soon as the credit and currency of the new nation were established and there was an end to the chaos that had prevailed during the Revolution there was an end to the price-fixing laws as well.

---

and amending Acts of Feb., March and May, 1777, *id.* at 831, 833, 835. These acts were repealed in Aug., 1777, *id.* at 851. Connecticut, Act of 1777, effective Nov. 12, 1777, *id.* at 228. In 1778, following the New Haven meeting of representatives of the states, Connecticut passed a general price fixing statute, *id.* at 232. This was suspended later in the year and finally repealed, *id.* at 240, 242. Other Connecticut laws are summarized in U. S. DEP'T AGRIC., *op. cit., supra* note 2, at 19; see especially the price fixing Acts of Nov. 19 and Dec. 18, 1776, passed before the date of the Providence meeting.

[4] Act of May, 1777, see U. S. DEP'T AGRIC., *op. cit. supra* note 2, at 25.

[5] Act of June, 1777 to punish forestalling and engrossing and to limit the profit of retailers, see CLARK, *op. cit. supra* note 3, at 293.

[6] Act of Oct. 13, 1777 appointing a Council of Safety with power to regulate prices, see U. S. DEP'T AGRIC., *op. cit. supra* note 2, at 34.

[7] Act of Dec. 11, 1777, see CLARK, *op. cit. supra* note 3, at 513. This act was suspended in June, 1778 and again in October and December, 1778, *id.* at 529, 530, 531.

[8] Act of April 3, 1778, see *id.* at 595. This was suspended by Act of June 29, 1778 and repealed by Act of Oct. 28, 1778, *id.* at 601, 603. New York again embarked on a policy of general price fixing by Act of Feb. 26, 1780, *id.* at 636.

[9] See U. S. DEP'T AGRIC., *op. cit. supra* note 2, at 18, 25-27, 30-39, for references to changes in state laws during this period; the statutes there referred to and many others will be found in CLARK, *op. cit. supra* note 3, at 228-990.

[10] Between 1777 and 1780 eleven states passed laws prohibiting engrossing and forestalling. Some of these were passed as part of the price fixing laws while others were separate laws. Some were repealed soon after their enactment while others were in force during the entire period and remained on the statute books for some time thereafter. These laws are collected in CLARK, *op. cit., supra* note 3, and are as follows: *Connecticut,* 1777 and 1778, at 228, 241; *Delaware,* 1779, at 257; *Maryland,* 1777, 1778, and 1779, at 293, 300, 317, 344, 370; *Massachusetts,* 1777, 1779, at 420, 441; *New Hampshire,* 1777, 1778, at 471, 477; *New Jersey,* 1777, 1779, at 513, 532; *New York,* 1780, at 636; *North Carolina,* 1780, at 680, 689; *Pennsylvania,* 1778, 1779, 1780, at 708, 761, 784; *Rhode Island,* 1776, 1777, at 823, 835; *Virginia,* 1777, 1778, 1779, 1781, at 942, 952, 961, 983.

It is not surprising to find the states resorting to this method of control. Colonial history abounds with similar measures.[11] Assizes of bread had existed in nearly all of the colonies.[12] These, like their counterparts in England, involved price fixing. The charges of grist mills were generally subject to public control.[13] Laws against forestalling go back to colonial beginnings at Jamestown soon after 1607 and at Massachusetts Bay a little later.[14] There is some evidence that the assize of bread persisted in at least a few states after the close of the war and even for a few years after the establishment of the new government in 1789.[15] On the whole, however, the new nation shook off its colonial heritage of restrictive price control laws and gratefully gave up the unhappy experiences of the revolutionary years, for the problems of independence were quite different. It was at this time, too, that the *laissez faire* doctrines of Adam Smith, developed so systematically and rationally in his *Wealth of Nations,* published in 1776, were taking hold of men's minds on both sides of the Atlantic. It was in this state of affairs and of men's minds that the United States set out to develop its untapped resources, supply the wants of its people and take its place as a member of the family of nations. On every hand the effort was to protect the struggling young manufacturers at home, to encourage new ones, to foster the American carrying trade by water, to settle new lands and, in short, to build a self-sufficient economic unit.

II. CONTROL OF TRANSPORTATION

It remained for transportation to cement the bonds of the original union, and, coincidentally, to afford a new occasion for the exercise of governmental control over price. The waterways were, of course, the normal highways of an undeveloped country but these were not enough and from 1794 to about 1820 there was a mania

[11] Many of these colonial laws are summarized in U. S. DEP'T AGRIC., *op. cit. supra* note 2. We find that in 1640 Connecticut fixed the price of corn for use in payment of debts, *id.* at 19; in 1758 Georgia fixed the price of the work of tradesmen and in 1768 established the assize of bread, *id.* at 23; Maryland had a series of acts fixing the prices of a large number of commodities for use in the payment of debts beginning in 1692 and ending in 1730 and in 1671 it fixed the prices of wines, liquors and other commodities, *id.* at 25; Massachusetts in 1659 fixed the price of strong liquor and in 1720 established the assize of bread, *id.* at 27; Rhode Island in 1721 fixed the price of hemp and flax, *id.* at 35; South Carolina in 1687 fixed the price of corn, beef, pork, tobacco and tar for use in payment of debts, in 1695 it fixed the price of liquor sold in public houses and in 1740 Charlestown fixed the price of building materials as well as the wages of builders, *id.* at 37; Virginia fixed the price of tobacco as early as 1631 and continued this in 1633, 1639-40, 1755 and 1758; in 1647 and again in 1755 it fixed the price of corn; in 1661 it fixed the price of hides and shoes; in 1657 it gave bounties for the production of silk, flax, hops, etc., and fixed the prices for those products as well as wheat and in 1665 and again in 1682 it fixed the price of wheat, tobacco, flax and other commodities for use in the payment of debts, *id.* at 38.

Instances of general price fixing in Massachusetts going back to 1631 and 1634 are given in Jones, *supra* note 2, at 45-46.

[12] CLARK, HISTORY OF MANUFACTURES IN THE UNITED STATES, 1607-1860 (1916) 64.

[13] *Id.* at 63. A Rhode Island law of 1779 appears in CLARK, *op. cit. supra* note 3, at 860.

[14] See Jones, *supra* note 2, at 43-46.

[15] In U. S. DEP'T AGRIC., *op. cit. supra* note 2, we find reference to the assize of bread in Maryland in 1785, 1789 and in Baltimore in 1794 and 1796, at p. 26; in Richmond, Virginia, in 1790 and Alexandria in 1798, at p. 40; in New Hampshire in 1786, at p. 30; in Georgia in 1790, 1796 and 1797, at p. 21.

of road building. This was the era of the turnpike.[16] Hundreds of turnpike companies were chartered by the states and thousands of miles of road were built. Government, both state and federal, played an important part in this era, but in addition a large amount of private capital went into roads. That meant that the owners charged tolls. It is difficult to learn to what extent tolls were actually fixed in the many charters granted at this time but it is clear that they were fixed in some and it would seem to be beyond dispute that there was ample power to fix them in all.[17]

The turnpikes did not satisfy the growing nation. Even when well maintained, and that was seldom true, they were costly, slow, and ill suited to the transportation of bulky freight. Those who looked across the Atlantic found that England had been in a great era of canal building from about 1760 to the close of the century. Canal building was given a great impetus in the United States in 1807 when Albert Gallatin, Secretary of the Treasury, submitted a report advocating an extensive system of canals and turnpike roads to be constructed by the federal government.[18] These recommendations came to grief in the play of local forces and it was not until the completion of the Erie Canal by New York State in 1825 that we enter the era of canal building. The panic of 1837 put an end to it but in the meantime over 906 miles of canals had been built in New York State alone. Other states, especially Pennsylvania and Ohio, rivalled its achievements. The federal government contributed some money for this purpose but the great bulk of it came from state and private sources.[19] Here again there was the problem of tolls and this time we can state more positively that when charters were granted to private companies provisions were included fixing the tolls that might be charged, nor does there ever appear to have been any serious debate as to the power to do this[20]

In the same way that the turnpikes gave way to the canals in many sections so, too, the canals were destined to meet their match when the network of railroads was finally developed, but the process was slow. From 1840 until the close of the Civil War the canals fully justified their existence and they prospered[21] but by the beginning of the war some 30,000 miles of railroad had been constructed. This was a phenomenal growth from the small beginnings in 1830 but it was dwarfed by the boom days of railroad construction that followed. By 1890 the railroad network was 166,000 miles in extent and the continent had been spanned many times.[22] The effect of all this on economic life became apparent soon after the war. Before the war the Mississippi River enjoyed a large traffic in the produce of the middle west

[16] MEYER, HISTORY OF TRANSPORTATION IN THE UNITED STATES BEFORE 1860 (1917) cc. I, II; FAULKNER, AMERICAN ECONOMIC HISTORY (1924) 311-316; LARRABEE, THE RAILROAD QUESTION (4th ed. 1893) 37.

[17] MEYER, *op. cit. supra* note 16, at 68-70.

[18] FAULKNER, *op. cit. supra* note 16, at 313; LARRABEE, *op. cit. supra* note 16, at 33, 37-45; MEYER, *op. cit. supra* note 16, at 135.

[19] MOULTON, WATERWAYS VERSUS RAILWAYS (1912) c. V; MEYER, *op. cit. supra* note 16, cc. V-IX; FAULKNER, *op. cit. supra* note 16, at 317-324.

[20] MEYER, *op. cit. supra* note 16, at 72.

[21] MOULTON, *op. cit. supra* note 19, at 69.

[22] LARRABEE, *op. cit. supra* note 16, c. III; RIPLEY, RAILROADS: RATES AND REGULATION (1923) c. I.

destined for export by way of New Orleans or for the eastern seaboard but by 1872 it was estimated that eighty-three per cent of this traffic went east by rail and by 1879 seven-eights of the produce of the trans-Mississippi states did likewise. In the west Chicago had become the grain center of the country,[23] and by the middle of the '70's five great railroads had direct lines to the eastern seaboard.[24]

These were the essential economic facts which gave direction to the forces that are summed up in the Granger movement of the late '60s and early '70s, in which are found the beginnings that contributed in no small measure to the final outcome, the subjection of the vast railroad properties of the country to public control, both state and federal. First we must retrace our steps briefly. We have already noted that it was the panic of 1837 that put a stop to the mania of canal building but by that time the public debt of the states was over $170,000,000 and when this is compared with the figure of some $12,000,000 in 1820 it is evident that internal improvements, since most of this money went for roads and canals, were undertaken with an easy hand in those years. When the bubble burst in 1837 many states repudiated their debts and on every hand there was a desire to get out, and stay out, of expensive public improvements.[25] It was this circumstance, probably more than any other, that resulted in railroad construction being carried on by private corporations and individuals and not by the states or other public bodies. The initial impulse came from private sources but the railroad fever caught quickly and it was not long before the lessons of '37 were forgotten and public aid was extended with a lavish hand, even before the Civil War, to this new form of transportation.[26] In this period of construction the dominant impulse was the desire to get railroads built and this, coupled with the growing power of the builders, overshadowed all else. The gospel of *laissez faire* economics was never more potent and while there was a gesture of public control of rates in the form of a variety of charter and franchise provisions and in some early general laws, these were never more than a gesture.[27] There was another gesture in the form of advisory commissions established for the most part in the New England states but these are best described as permanent legislative fact-finding bodies.[28]

We come now to the Granger movement[29] for it represents the first crystallization of any effective body of opinion that something should be done about railroad rates and practices and, more concretely, that something should be done about them for the benefit of the farmers of the great middle and trans-Mississippi west. These farmers grew articulate for the first time through the order of Patrons of Husbandry, organized in 1867. While the order attempted to hold itself aloof from the partisan

[23] MOULTON, *op. cit. supra* note 19, at 85-86.

[24] FAULKNER, *op. cit. supra* note 16, at 452. [25] *Id.* at 324.

[26] *Id.* at 332. After the war public aid was given on an even more lavish scale. *Id.* at 456.

[27] MOSHER AND CRAWFORD, PUBLIC UTILITY REGULATION (1933) 14; MEYER, RAILWAY LEGISLATION IN THE UNITED STATES (1903) Pt. II, cc. I and II, discuss the rate provisions of early railway charters and general laws.

[28] MOSHER AND CRAWFORD, *op. cit. supra* note 27, at 16.

[29] BUCK, THE GRANGER MOVEMENT (1913), is indispensable to any study of this movement.

political arena it was an important rallying point for the forces that demanded public control of railroads and as such it partook of the broader political movement. There was something of repentance and frustration, stored-up anger and exasperation in all this. Princely domains had been bestowed upon the railroad companies and princely treasures too, and the farmer himself had made his contribution. In return he expected speedy and cheap transportation of his great staple crops, wheat and corn, to the eastern seaboard but speed and cheapness are relative terms. He made no complaint on the score of speed but the new cheapness seemed unduly high. There were rate wars that promised cheapness but these always seemed to end in treaties of peace that took the form of pools and agreements; moreover, the rate wars seemed to occur only at the competitive points where the contending forces joined issue, and the sinews for the battle seemed to come from unduly high rates at other points. To this discrimination there was added the rebate accorded none too willingly to the big favored shipper and the farmer was not apt to be in this class nor was he the beneficiary of the free passes distributed freely where they would do the most good. The stock market battles, the jobbery and frauds in connection with construction contracts, the watering of stock, all these were foreign to him and so he fastened his eye on what he could see closer to home and the principal things he saw were rankly discriminatory rates and unduly high rates.

The Patrons of Husbandry, or Grange, reached its greatest strength in 1875 when it had over 750,000 members from nearly every state of the union and as such was a new and potent force in American politics. The so-called "Granger Laws" to control railroad rates are directly traceable to its influence. The most important of these were passed in Illinois (1869, 1871, 1873),[30] Minnesota (1871, 1874, 1875),[31] Iowa (1873, 1874),[32] Wisconsin (1874, 1875)[33] and Missouri (1875)[34] but there was agitation for control in nearly every state. In Illinois the grain warehousemen of Chicago were also the object of a regulatory measure and in 1871 maximum charges for the storage of grain were fixed by statute.[35] It must not be supposed that effective public control sprang into existence with the passage of these laws. Many of them were drastic, like the Potter law of 1874 in Wisconsin. Many were largely ineffective for efforts at enforcement were resisted and often thwarted. Almost everywhere the railroad builders were powerful forces and in many states the laws were repealed or sharply modified. But out of this period two important precedents were fixed. The first was the acceptance by the Supreme Court of the United States of the principle that there is power in the states to regulate the charges of railroads and public grain warehouses together with the solemn statement, later repudiated, that "For protection against abuses by legislatures the people must resort to the polls, not to the courts."[36] The second was the emergence of the mandatory commission

[30] *Id.*, c. IV. [31] *Id.* at 159 *et seq.* [32] *Id.* at 166 *et seq.*
[33] *Id.* at 179 *et seq.* [34] *Id.* at 194 *et seq.* [35] *Id.* at 134.
[36] Munn v. Illinois, 94 U. S. 113, 134 (1876). Other Granger cases are Chicago, B. & Q. Ry. v. Iowa, 94 U. S. 155 (1876); Peik v. Chicago & N. W. R. R., 94 U. S. 164 (1876).

vested with power to fix rates and control certain practices as the most effective device for exercising public control.

Both precedents were important when the scene shifted to the Congress with the passage of the Interstate Commerce Act of 1887. The political force of the Granger movement had long since died down but other agrarian groups, notably the Farmers Alliance and the Northwestern Alliance,[37] had carried on the work with equal determination. The Knights of Labor, the first national labor organization and a real power in the late '70s and '80s, went all the way and demanded government ownership of railroads.[38] New forces were making themselves heard in politics. Independent parties were the order of the day as the leadership of the old parties was challenged.

These forces found expression in the halls of Congress. There was agitation for cheap transportation by government competition through public waterways and a national freight railroad.[39] In 1874 the House passed the McCrary bill creating a commission with power to fix maximum rates, but it failed in the Senate.[40] In the years that followed other bills were introduced and in 1878 one passed in the House but the final impulses that led to the Act of 1887 came from the startling revelations of the Cullom Report of 1886[41] and the decision of the Supreme Court declaring state regulation of interstate rates to be violative of the commerce clause.[42] The Cullom Report disclosed a sorry picture of unreasonably high local rates as compared with through rates, unreasonably high rates at non-competing points, rank discriminations between persons, places and classes of freight, secret rebates, pooling agreements, and the whole catalogue of prevailing abuses of railroad management. The Supreme Court decision made it clear that if there was to be effective regulation the federal government must do its part, and it would be a leading one, for by this time the purely intrastate haul was but a minor part of railroad transportation. The result was the Interstate Commerce Act of 1887. We must stop here, for the story of experience under the original act, its frustrations, its amendments, and the work of the Interstate Commerce Commission, is a long one.[43] What concerns us is that we find here price control exercised over the basic transportation system of the United States and important among the objectives of the original act were the requirements that rates be reasonable, public and non-discriminatory. The last one, a characteristic of all public utility measures, will make its reappearance in a new form in more recent measures dealing with price policies in industry and trade generally.

[37] Drew, *The Present Farmers Movement* (1891) 6 POL. SCI. Q. 282, gives an account of the organization and aims of these groups; BUCK, THE AGRARIAN CRUSADE (1920), is invaluable to an understanding of this period, see especially cc. VI-X.

[38] See BEARD, THE RISE OF AMERICAN CIVILIZATION (1930) c. XXI.

[39] HANEY, A CONGRESSIONAL HISTORY OF RAILWAYS IN THE UNITED STATES, 1850-1887 (1910) c. XIX.

[40] *Id.* at 283.

[41] SEN. REP. No. 46, 49th Cong., 1st Sess. (1886).

[42] Wabash, St. L. & P. R. R. v. Ill., 118 U. S. 557 (1886).

[43] Professor I. L. Sharfman has to date published four volumes of a projected five on the history and work of the Interstate Commerce Commission.

III. THE ANTI-TRUST MOVEMENT

The story of the almost fantastic growth of industry and trade from the close of the Civil War to the end of the century has been told many times.[44] The United States was the greatest free trade area in the world. With a constant development of transportation facilities by water and by rail, regional and national markets for the products of the factory were developed on a growing scale. It was the age of the corporation for by the end of the century three-fourths of the manufactured products came from factories owned by corporations, great and small. Expressed in statistics of iron, steel, coal, sugar, oil, copper, beef, pork, lead and other sinews of modern industrialism, the results are indeed impressive. Expressed in terms of human and social values, there is not so much to be said. There were many new millionaires, lords of great financial and industrial domains, but there were multitudes who knew only the long hours of labor, the all too scant pay, and the squalor of the new urban and industrial order.

We have already referred to the agrarian movement of the '70s and its results in the railroad legislation of the middle west. In 1876 it entered the national political scene and, as the Greenback party, polled some 80,000 votes for its candidate for President. In 1880 it polled 308,578 votes and in 1884, 175,370 votes but that was the end of the party.[45] The Greenback party was a movement of agrarian discontent and protest but its specific for the farmer's troubles was inflation of the currency though there was always a strong flavor of anti-railroad and anti-monopoly in its platforms.[46] In the late '80s there was a ferment of organization of agrarian groups. The most powerful of these was The National Farmers Alliance and Industrial Union which claimed a membership of 3,000,000 in 1890.[47] At the elections of that year it secured one Senator and forty-four Representatives pledged to support its demands.[48] In the field of labor, too, the workingman was making the beginnings of organization on a national scale. In 1875 the Knights of Labor was organized and by 1885 it was strong enough to cripple the Gould railroads with a strike. The following year the American Federation of Labor was organized.[49] All of these groups were important forces by 1890 and at the election of 1892 they rallied under the banner of the People's party and polled over a million votes.[50]

The leadership of the old parties was put on the defensive as these portents came from the west. The old parties were engaged in a contest over what principle should govern tariff legislation and the national election of 1888 was fought on the

[44] This story is well told in BEARD, *op. cit. supra* note 38, c. XX.

[45] BRUCE, AMERICAN PARTIES AND POLITICS (3d ed. 1936) 118, 137.

[46] MCKEE, THE NATIONAL CONVENTIONS AND PLATFORMS OF ALL POLITICAL PARTIES, 1789-1901 (1901) 191, 215.

[47] DREW, *op. cit supra* note 37; BUCK, *op. cit. supra* note 37.

[48] BUCK, *id.* at 133.

[49] See BEARD, *op. cit. supra* note 38, c. XXI; 2 COMMONS, HISTORY OF LABOUR IN THE UNITED STATES (1926) 362.

[50] BRUCE, *op. cit. supra* note 45, at 137.

issue of a tariff for revenue as against a tariff for protection. This was the basic issue and while both major parties, as well as the independent parties, had anti-trust planks in their platforms for the first time,[51] they did not figure as issues in the campaign except perhaps as the Democrats charged that the protection principles of the Republicans tended to foster and protect trusts and combinations.[52]

That there were trusts, pools and combinations in the new industrial order was evident by this time. The Standard Oil Trust (1882), the Cotton-Seed Oil Trust (1884), the Linseed Oil Trust (1885), the National Lead Trust (1887), the Whiskey Trust (1887), the Sugar Trust (1887) and the Diamond Match Company (1889) were the most important.[53] Apart from the trust proper it was charged that industry was honeycombed with pools, gentlemen's agreements to fix prices and limit production, and exclusive selling agencies to market the products of competitors, all designed to limit competition and control prices.[54] The reports of investigating committees had brought most of this before the public.[55] The Cullom Report of 1886 had exposed the part played by discriminatory railroad rates and rebates in the building of the new economic empires.[56]

These revelations had had some effect in the states and before July 2, 1890, the date of the Sherman Act, twenty-one states, mostly in the south and middle and far west, had written into their constitutions, or statutes, or both, prohibitions against "monopoly" and "restraint of trade" in one form or another.[57] But the trusts at this time were national in their scope and state laws could do little about them and little was attempted.

When we turn to the passage of the Sherman Act by the Congress it is difficult to find that that body was responding to an aggressive public demand that something be done about "the trust problem." The national campaign of 1888 had been fought on the tariff issue, as we have noted, and the Congress of 1890 devoted most of its time and attention to the passage of the McKinley Tariff Act of 1890, an act that for the first time was based largely on the principle of protection.[58] The agrarian forces marshalled their strength in opposition to it but the best they could get was protection for farm products that was neither wanted nor needed and the passage

[51] McKEE, *op. cit. supra* note 46, at 235, 241, 247, 251. The Democratic party in 1884 had a mild and equivocal anti-trust plank in its platform. *Id.* at 206.

[52] *Id.* at 235.

[53] SEAGER AND GULICK, TRUST AND CORPORATION PROBLEMS (1929) 49-60; JONES, THE TRUST PROBLEM IN THE UNITED STATES (1928) c. III.

[54] *Id.* c. II.

[55] In 1888 a committee of the New York Senate brought to light facts about the sugar trust and other combinations, N. Y. SEN. DOC. No. 50 (1888); two reports were submitted in 1888 by a House committee which had investigated the oil, sugar, whiskey and cotton-bagging combinations but the report was poorly presented and contained no recommendations for legislation. H. R. REP. No. 3112, 50th Cong., 1st Sess. (1888); H. R. REP. No. 4165, 50th Cong., 2d Sess. (1889).

[56] *Supra* note 41; the earlier Windom Committee report of 1874 had contained similar facts. SEN. REP. No. 307, 43d Cong., 1st Sess. (1874).

[57] SEAGER AND GULICK, *op. cit. supra* note 53, c. XVII.

[58] TAUSSIG, THE TARIFF HISTORY OF THE UNITED STATES (1923) c. V.

of the Silver Purchase Act, an act that was but a halting step in the direction of the currency measures that they were advocating.

It is difficult, too, to escape the conclusion that the Sherman Act fits in the same category.[59] In the Senate the vote was 52 to 1. In the House it was unanimous. There was little debate in either body. In the Senate it took up only five days at different times while in the House it is hard to find more than one day devoted to this subject.[60] There was public knowledge of the existence of trusts and their practices but it had not been translated into any aggressive demand for legislation. There was another issue that was in the forefront and it was the tariff. The Sherman Act would be a simple answer to those who denounced the tariff as a measure that would enrich the trusts and foster higher prices. The unanimity with which it became law makes the Act seem to be little more than a measure to appease the growing unrest in the farming and industrial regions. Senator Platt of Connecticut took that view of the matter when he characterized the proceedings in the Senate as not "in the line of the honest preparation of a bill to prohibit and punish trusts. It has been in the line of getting some bill with that title that we might go to the country with."[61]

The debates are of little help in shedding light on the precise meaning of the law. It was Mr. Justice Peckham who summed the matter up when he declared that "all that can be determined from the debates and reports is that various members had various views."[62] The general language of the law was an invitation to debate and controversy as to its meaning and effects and, in the hands of lawyers and judges, that controversy still persists. The economics of the Sherman Act may be simply stated. Monopolies and attempts to monopolize are proscribed and so are contracts and combinations in "restraint of trade." There is here a legislative attempt to protect a system of competition against the operation of forces that would tend to destroy it. This involves a conception of a norm of competition which when operative would insure fair prices to the consumer and fair profits to the producer. The preservation of the automatism of free competition, enforced by government, was the great objective. It is noteworthy that with the precedent of the railroad law so fresh in its mind the Congress entrusted its broad mandate to the judges rather than to an administrative body charged with responsibility for endowing it with meaning in the first instance.

Until after the turn of the century the story of the Sherman Act is not that of a law passed in response to an insistent public demand. It fairly languished on the statute books. President Harrison was in office for close to three years after he approved the Sherman Act on July 2, 1890 yet these years are barren of any effective

[59] BUCK, *op. cit. supra* note 37, at 132.

[60] KNAUTH, THE POLICY OF THE UNITED STATES TOWARDS INDUSTRIAL MONOPOLY (1914) c. II; CLARK, THE FEDERAL TRUST POLICY (1931) c. III; SEAGER AND GULICK, *op. cit. supra* note 53, at 372-373.

[61] As quoted in BEARD, CONTEMPORARY AMERICAN HISTORY, 1877-1913 (1914) 136. See also 21 CONG. REC. 2729 (1891).

[62] U. S. v. Trans-Missouri Freight Ass'n, 166 U. S. 290, 318 (1897).

steps against the well known trusts.[63] An indictment against the Whiskey Trust was found to be faulty and was quashed and at the close of the administration a bill in equity was filed against the Sugar Trust. A suit against the Trans-Missouri Freight Association, involving an agreement as to rates among a group of railroads, was unsuccessful in the lower courts though the United States won in the Supreme Court during the administration of President Cleveland. The record of the second Cleveland administration is little better.[64] The suit against the Sugar Trust was decided by the Supreme Court in 1895 and it was a complete victory for the trust.[65] There was a little comfort in the success of the suit against the Trans-Missouri Freight Association,[66] and this was confirmed in a later decision in a similar suit against the Joint Traffic Association.[67] But these successes were gained by a 5 to 4 vote in the *Trans-Missouri* case and a 5 to 3 vote in the *Joint Traffic* case while the defeat in the *Knight* case had provoked only one dissent. There is little more to be said about the McKinley administration. There was a unanimous victory in the suit instituted under Cleveland against the Cast Iron Pipe combination, and that is all.[68]

A law passed in response to an insistent popular demand does not lie idle on the statute books for ten years, as this one had, while the objects against which it is directed gain in number and size and power, yet that is precisely what had happened. The *Knight* case of 1895 seemed to remove any obstacle to combination that the Sherman Act might have presented and this, together with the defeat of Bryan in 1896, the Dingley tariff of 1897 and an era of business prosperity that followed, were all factors favorable to the further development of the trust movement. In these years combinations generally made use of the holding company device. The new combinations were organized on a gigantic scale, the biggest of all being the billion dollar Steel Trust of 1901.[69]

During the administrations of Theodore Roosevelt and Taft there was far greater activity in the enforcement of the Sherman Act than there had ever been before.[70] The victory of the United States in the *Northern Securities* case in 1904,[71] even though the Court was almost as badly divided in its reasons as it was in its votes, was enough to shake the faith of the trust organizers in the immunity of the

[63] The record of the Harrison administration is reviewed in WALKER, HISTORY OF THE SHERMAN LAW (1910) c. IV.

[64] *Id.* c. V.

[65] U. S. v. E. C. Knight Co., 156 U. S. 1 (1895).

[66] U. S. v. Trans-Missouri Freight Ass'n, 166 U. S. 290 (1897).

[67] U. S. v. Joint Traffic Ass'n, 171 U. S. 505 (1898).

[68] U. S. v. Addyston Pipe and Steel Co., 175 U. S. 211 (1899); WALKER, *op. cit. supra* note 63, c. VI.

[69] SEAGER AND GULICK, *op. cit. supra* note 53, c. V, describes the movement during this period; see also BEARD, *op. cit. supra* note 61, c. IX.

[70] During the Roosevelt administrations there were brought 18 bills in equity, 25 indictments and one forfeiture proceeding. President Taft outdid this, his administration bringing 46 bills in equity, 43 indictments and one contempt proceeding. A list of cases instituted by the United States under the anti-trust laws during the different administrations will be found in THE FEDERAL ANTITRUST LAWS (U. S. Gov't Printing Office, 1928).

[71] Northern Securities Co. v. U. S., 193 U. S. 197 (1904). The court split five to four, and four opinions were delivered.

holding company device and there was a definite halt in the movement. The sweeping victories seven years later in the *Standard Oil*[72] and *American Tobacco*[73] cases brought with them the labored enunciation of the "rule of reason" by Chief Justice White. With all its vagaries it still stands as the accepted reading of the Sherman Act. The rule did not, however, gain ready acceptance for a Senate committee in 1913 reported that this rule made it "imperative to enact additional legislation." The committee found itself "unwilling to repose in the Supreme Court, or any other court, the vast and undefined power which it must exercise in the administration of the statute under the rule which it has promulgated."[74]

In spite of this attitude the "rule of reason" survived the attempt to change it and the final legislative products, the Clayton Act[75] and the Federal Trade Commission Act,[76] represented a reaffirmance of the basic faith of the Sherman Act. They differed not at all from the Sherman Act in their purposes but only in the methods to be pursued to achieve the common objective.[77] Both were designed to implement the earlier law. It was believed that certain practices were so generally the tools of incipient monopoly that the proscription of those practices would halt the fruition of monopoly and restraint of trade. It was believed that government would act more effectively if it could step in and check certain practices than if it must wait until its only recourse was to seek to dissolve the trust at the height of its power. It is in this connection that the prohibition against the discriminatory price first made its appearance in federal anti-trust law in Section 2 of the Clayton Act. It was designed to check the elimination of a competitor by local price cutting. The objective here is quite different from that of the typical public utility law. The latter, with its requirements that rates be non-discriminatory and be published and adhered to, imposes a substantially uncompromising one-price policy on the utility whereas the anti-trust flavor injected into the Clayton Act marks a definite compromise with that idea.

To sum up, the basic faith in all this anti-trust legislation was a faith in the automatism of free competition. If this could be preserved by government, the merits of the system, so convincingly set out in 1776 by Adam Smith in his *Wealth*

[72] Standard Oil Co. of N. J. v. U. S., 221 U. S. 1 (1911).

[73] U. S. v. American Tobacco Co., 221 U. S. 106 (1911).

[74] SEN. REP. No. 1326, 62d Cong., 3d Sess. (1913).

[75] 38 STAT. 730 (1914), 15 U. S. C. §13. [76] 38 STAT. 717 (1914), 15 U. S. C. §41.

[77] The statement in the text must be confined to the legislative purpose behind these laws. See HENDERSON, THE FEDERAL TRADE COMMISSION (1924) c. I; CLARK, THE FEDERAL TRUST POLICY (1931) c. VIII; Montague, *The Federal Trade Commission and the Clayton Act* in SOME LEGAL PHASES OF CORPORATE FINANCING, REOGRANIZATION AND REGULATION (1917); Handler, *The Jurisdiction of the Federal Trade Commission over False Advertising* (1931) 31 COL. L. REV. 527. The judicial view as to the purpose of the Federal Trade Commission Act is clearly expressed by Mr. Justice Sutherland in F. T. C. v. Raladam, 283 U. S. 643, 650 (1931), and by Mr. Justice Brandeis (dissenting) in F. T. C. v. Gratz, 253 U. S. 421, 434 (1920). It must be recognized that many of the practices challenged by proceedings under this legislation have had little, if anything, to do with the practices that motivated the legislation; as to the Federal Trade Commission, see Handler, *supra*, and as to §2 of the Clayton Act, see McAllister, *Sales Policies and Price Discrimination under the Clayton Act* (1932) 41 YALE L. J. 518, but this does not invalidate the statement as to legislative purpose.

of Nations, would work. It is in this sense only that anti-trust laws involve control of price. There is here no direct control by government. It is only by indirection, by seeking to maintain conditions of competition, that government makes itself felt in the market place.

IV. Extension and Restriction of Direct Price Control: 1907-1929

It is to the expanding field of public utilities that one must turn for direct control of price. The early Granger decisions of the Supreme Court in 1876, particularly *Munn v. Illinois,*[78] contained in them the recognition of state power to regulate the charges of public utilities but it was not until 1907 that the movement began for further state regulation. At that time gas and electricity were coming to be the household necessities that they are today. With the monopoly that was necessarily enjoyed by the owners of the pipes and wires there came direct control of price, and in 1907 New York under Governor Hughes and Wisconsin under Governor La Follette enacted laws creating state public service commissions with broad powers to regulate the charges of public utilities. In the selection of the commission method of control there is a further reminder of the pioneer Granger railroad laws. The movement spread rapidly and within six years twenty-two states had created commissions with varying powers over different kinds of utilities. It was at this time, too, that state control of insurance first made its appearance.[80] Today only Delaware is without such a commission. The list of utilities subject to public control has grown from the railroads, warehouses, and grain elevators of the Granger days to include electric light and power, gas, street and interurban railways, telephone and telegraph, motor vehicle carriers, water works, pipe lines and heating plants.[81] In all of this legislative price control there is the necessary corollary that prices be non-discriminatory.

During the World War the United States undertook a broad policy of price fixing. Prices were fixed for basic raw materials such as iron ore, copper, lumber, coal, zinc, sulphuric acid and many consumption necessaries such as sugar, flour and raisins. The necessities of the war brought this about and price fixing ended with the Armistice.[82] The rent law of New York and similar Congressional action for the District of Columbia were a part of the war movement.[83] In 1919, as an aftermath of war conditions, Montana undertook to vest in a state commission power to fix the price of all commodities but this effort ran afoul of constitutional arguments and was short lived.[84]

[78] *Supra* note 36.

[79] This movement is reviewed in MOSHER AND CRAWFORD, *op. cit. supra* note 27, c. II.

[80] German Alliance Ins. Co. v. Lewis, 233 U. S. 389 (1914) (sustained the constitutionality of the Kansas law).

[81] MOSHER AND CRAWFORD, *op. cit. supra* note 27, c. III.

[82] See Haney, *Price Fixing in the United States during the War* (1919) 34 POL. SCI. Q. 104, 262, 434.

[83] Block v. Hirsch, 256 U. S. 135 (1921); Marcus Brown Holding Co. v. Feldman, 256 U. S. 170 (1921).

[84] Holter Hardware Co. v. Boyle, 263 Fed. 134 (D. Mont. 1920), *appeal dismissed on stipulation* 257 U. S. 666 (1920), 33 HARV. L. REV. 838.

The Packers and Stockyards Act of 1921[85] was the result of years of fruitless agitation, investigation and efforts to enforce the anti-trust laws. From 1918 to 1920 the Federal Trade Commission released a series of reports of its turbulent investigation of the meat packers and thereafter the demand for special legislation would not down.[86] The law itself was little more than a codification of anti-trust matters with special reference to the practices prevailing in the meat packing and stockyards businesses. The only departure from orthodox anti-trust policy was in the power vested in the Secretary of Agriculture to fix the maximum charges for the services of stockyards.[87] This was direct price fixing and to that extent represented a departure from the tenets of the Sherman Act. It was evident to the investigators and the Congress that competition played no part in the fixing of these charges.

Before considering the recent price control legislation of the depression years it remains but to record the price fixing attempts of the 1920s that make up the Index Expurgatorius of the Supreme Court. They include the charges of theatre ticket agents,[88] employment agents,[89] gasoline,[90] and ice.[91] How these matters came to be on this Index has been discussed elsewhere.[92] Its existence lends point to other and indirect methods of price control and, of these, competition by government is apt to be important. The Index will thus merely deflect the course of governmental action.

V. PRICE CONTROL DURING THE DEPRESSION

The economic dislocations caused by the depression brought forth new sorts of price control. Heretofore we have been concerned solely with efforts of government to circumscribe economic power of one kind or another in such a way as to check real or fancied exploitation of the public. The measures may have taken the form of direct price control or the indirect methods of the anti-trust laws but in all the legislative purposes were the same. The objectives of the depression legislation to be considered now were quite different.

New York State led the way with a statute of 1933 to fix the price of milk. An investigation lasting nearly a year preceded legislative action. The importance of the dairy industry in the agricultural economy of the state, the dependence of the people on the continuance of an essential food supply and the serious threat to the industry caused by the alarming price declines of 1931 and 1932, were all factors that led the state to seek to rescue the industry by direct price fixing. The prices received by the farmer for his milk had fallen below the cost of production and it was this that the legislature sought to correct. The statute received the constitutional

[85] 42 STAT. 159 (1921), 7 U. S. C. §201. See Stafford v. Wallace, 258 U. S. 495 (1922).

[86] FED. TRADE COMM'N, REPORT ON THE MEAT PACKING INDUSTRY (1918-1920).

[87] The constitutionality of this section of the act was sustained in Tagg Bros. & Moorhead v. U. S., 280 U. S. 420 (1930).

[88] Tyson v. Banton, 273 U. S. 418 (1927).

[89] Ribnik v. McBride, 277 U. S. 350 (1928).

[90] Williams v. Standard Oil Co. 278 U. S. 235 (1929).

[91] *Cf.* New State Ice Co. v. Liebmann, 285 U. S. 262 (1932).

[92] McAllister, *Lord Hale and Business Affected with a Public Interest* (1930) 43 HARV. L. REV. 759.

blessing of the Supreme Court but only by a close margin.[93] The movement spread rapidly into about a dozen other states[94] but the New York law expired by limitation in April, 1937 and has not been renewed. This will probably mark the end of similar measures in the neighboring states.

The National Industrial Recovery Act[95] was a similar rescue expedition but on a much broader scale. It sought to deal with the ravages of a nationwide business depression. In this broad objective it played its part along with other measures for relief and recovery. There was price fixing and price control in a variety of forms in the N.R.A. codes of fair competition but the dominant purposes of the entire effort were to put people back to work by shortening hours of labor, to increase general purchasing power by fixing minimum wages and to encourage collective bargaining as to wages above the minimum.[96] If industry was to pay the increased cost growing out of this program it demanded, and in a large measure received, various forms of price control in the codes. These have been reviewed in detail elsewhere[97] and there is no need to run through the list again. It is noteworthy, however, that the process of code making was predominantly one of higgling and bargaining between government and the interested parties with only a phantom mandate from the Congress. It was in this haphazard fashion that the government found itself embarked upon the most extensive effort at price control ever undertaken in this country when the Supreme Court put an end to the whole enterprise.[98] There is a wealth of experience in the short history of the codes and much to be learned in the field of economics and, of equal importance, in the determination of the limits of effective public administration. As far as public law is concerned, the reproving words of the Supreme Court addressed to the unbounded delegation of power by the Congress should have a salutary effect. Hereafter we may look for Congressional mandates that articulate a policy. It is a vain exercise to attempt to reconcile the economics of the N.R.A. with the tenets of the anti-trust laws. In spite of the deferential gesture of the Congress towards the earlier dogma we have it now on high authority that in the codes as finally written there was a denial of the older

[93] Nebbia v. New York, 291 U. S. 502 (1934). The conditions in the industry as revealed in the investigation that gave rise to this statute are fully set forth in the majority opinion in this case. The original statute expired by limitation on March 31, 1934 but was extended for additional periods until April, 1937. It was allowed to lapse on that date. Goldsmith and Winks, *Price Fixing: From Nebbia to Guffey* (1936) 31 ILL. L. REV. 179.

[94] Laws of New York, Virginia, New Jersey and Pennsylvania are discussed in Note (1936) 21 CORN. L. Q. 366. Price fixing laws were also found in the following states: *Connecticut*, GEN. STAT. (Cum. Supp. 1933, 1935) c. 107a, §§796c-811c, 1933, 1935; *Florida*, Laws 1935, Vol. 1, p. 772; *Massachusetts*, Acts 1934, c. 376; *Ohio*, OHIO GEN. CODE (Page, Supp. 1926-1935) §1080; *Oregon*, CODE (Supp. 1935), §41-2001; *Rhode Island*, Pub. Laws 1934, p. 64; *Vermont*, Pub. Laws 1933, c. 197, §4618; *Wisconsin*, Laws 1933, c. 65.

[95] 48 STAT. 195 (1933), 15 U. S. C. §703.

[96] For what must now be taken to be an authoritative statement of the background, objectives and economic policies of this effort, see REPORT OF THE PRESIDENT'S COMMITTEE OF INDUSTRIAL ANALYSIS ON THE NATIONAL RECOVERY ADMINISTRATION, (Feb. 17, 1937) c. I; see also LYON *et al.*, THE NATIONAL RECOVERY ADMINISTRATION (1935) c. III.

[97] TERBORGH, PRICE CONTROL DEVICES IN N.R.A. CODES (1934); LYON *et al*, *op. cit. supra* note 96, c. XXIII.

[98] Schechter Poultry Corp. v. U. S., 295 U. S. 495 (1935).

laws in many and important particulars and of these price control stands at the head of the list.[99]

The Bituminous Coal Conservation Act of 1935[100] was, of course, directly traceable to the N.R.A. It was but a special code for a particular industry and as such it provided for control of hours of labor, wages and prices. In the bituminous coal industry labor cost amounts to about two thirds of the cost of producing a ton of coal.[101] In this circumstance any force that determines the wage level will make itself felt in the price level. The interdependence of the two is so great that any control of the one will produce effects on the other. If the wage contract is to be controlled then it is necessary to control prices in order that operators may be able to pay the wages. If prices are controlled, the level at which they are fixed will largely determine the kind of a wage contract that may be made. Government sought to deal with both factors in the original act. Six Justices of the Supreme Court were explicit in declaring that the Congress was without power to deal with the factor of labor costs and four Justices were equally explicit in sustaining the power to deal with the factor of prices.[102] Judicial utterances as to the separability or inseparability of the provisions of the act dealing with these matters will have no effect on the economics of the industry. However disappointed organized labor may be in the outcome of the initial constitutional tilt the demand for price control still has its support for the bearing of prices on wages is all important in the still depressed coal industry. The new Bituminous Coal Act of 1937[103] is the fruit of the demand for price stabilization. It is an attempt to salvage what may turn out to be valid in the second encounter with constitutional arguments. The debate as to the validity of price control will not be cast in terms of the bearing of prices on wages but any consideration of the legislative purpose must give an important place to the desire to exert control over this vital factor in the process of writing a wage contract.

VI. PRICE DISCRIMINATION: THE ROBINSON-PATMAN ACT

The Robinson-Patman Act[104] is not an anti-trust law for, though it bears a superficial resemblance to Section 2 of the Clayton Act[105] which it undertakes to

[99] See REPORT OF THE PRESIDENT'S COMMITTEE, *supra* note 96, at 216 *et seq.*

[100] 49 STAT. 991 (1935), 15 U. S. C. §801.

[101] "The interdependences of wages and prices is manifest. Approximately two thirds of the cost of producing a ton of coal is represented by wages," *per* Mr. Justice Sutherland in Carter v. Carter Coal Co., 298 U. S. 238, 315 (1936).

[102] Carter v. Carter Coal Co., 298 U. S. 238 (1936).

[103] The text of the act appears in C. C. H., TRADE REGULATION SERVICE, Coal Regulation. It was signed by the President in April, 1937. To the effect that organized labor supports the price control provisions, see the statement of counsel for the United Mine Workers of America who had cooperated in the drafting of the Act, as quoted in the dissenting opinion of Mr. Justice Cardozo in the Carter Case, 298 U. S. at 336.

[104] 49 STAT. 1526 (1936), 15 U. S. C. §§13, 13a. Excellent discussions of the Act appear in Notes (1936) 50 HARV. L. REV. 106; (1937) 46 YALE L. J. 447; (1936) 36 COL. L. REV. 1285. See also valuable discussions by Phillips, *The Robinson-Patman Anti-Price Discrimination Law and the Chain Store,* (1936) 15 HARV. BUS. REV. 62, and by the speakers at the symposium held by the Trade Association Executives in New York City and published as CONFERENCE PROCEEDINGS ON THE ROBINSON-PATMAN ANTI-DISCRIMINATION ACT (1936).

[105] 38 STAT. 730 (1914), 15 U. S. C. §13. This section is discussed by the writer in *Sales Policies and Price Discrimination under the Clayton Act* (1932) 41 YALE L. J. 518.

amend, both the forces that brought it about and its objectives are quite different. Nor is it a legislative rescue expedition traceable to the depression. And, of course, it is not a price-fixing measure though its general requirement that prices be non-discriminatory is characteristic of measures designed to control the charges of public utilities. Its concern is with the marketing structure by which goods pass from the producer to the ultimate consumer, and this sets it apart from earlier laws. Nationwide and regional markets have introduced great variety and complexity into marketing structures and in many instances the familiar lines separating manufacturer, wholesaler and retailer have been broken. Chain organizations of many forms, department stores, mail order houses and cooperative buying pools are all evidence of basic change. The necessary functions are performed in different ways and are often combined in one hand but wherever goods must pass from person to person in this process the price paid for goods may be vital to the prosperity or even survival of a given class of persons in the hierarchy of distribution. It is for this reason that the Robinson-Patman Act takes a proper place in any discussion of price control by law for it seeks to outlaw a price practice that is thought to constitute an unfair advantage secured by the mass distributor, this relatively new colossus in marketing, in the contest with the independent. It is an anti-chain store law and must take its place in its legislative purpose with other measures of like import.[106]

In spite of this particular objective the Act is drawn in universals and these, when examined in the particulars of a great variety of marketing problems, prompted one able commentator to declare that there is "a lawsuit in literally every word of it."[107] From this there is no dissent. Moreover, this fact has posed a difficult problem for the writer of this "survey" article which has been met only by a rigorous selection of matter for discussion. In this process, a consideration of Section 3 of the Act has been eliminated. That section was the fruit of a legislative compromise. The Robinson-Patman Bill encountered a rival in the Borah-Van Nuys Bill which subjected to criminal penalties certain discriminatory practices which were comprehended by the provisions of the Robinson-Patman Bill. The contest between the two measures was resolved by the inclusion of the Borah-Van Nuys provisions in the Robinson-Patman Act as Section 3, a procedure which has bred a host of interpretive problems. No prosecutions are known to have been instituted under Section 3, and it seems clear that Section 1, amending Section 2 of the Clayton Act, will prove the significant provision of the new Act. Attention has therefore been confined to it.[107a]

The Act declares that "it shall be unlawful for any person engaged in [interstate]

[106] For the political and commercial background and legislative history of the Act, see Ellison in CONFERENCE PROCEEDINGS, *supra* note 104, Evans, *Anti-Price Discrimination Act of 1936* (1936) 23 VA. L. REV. 140-146. The original act was drafted by counsel for the United States Wholesale Grocers Association and was actively promoted as an anti-chain store measure by that association.

[107] Gordon in CONFERENCE PROCEEDINGS, *supra* note 104, at 21.

[107a] There will, however, be no reference to problems arising under subsections (c) (d) and (e) of that section dealing with payment of brokerage and advertising allowances.

commerce . . . either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce [up to this point the Act is substantially identical with old Section 2 of the Clayton Act but what follows is new] or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination or with customers of either of them. . . ." It is at once apparent that, like old Section 2, it is not every discrimination in price that is outlawed but only those that produce the specified effects on competition. There are, then, two questions to be asked and each must be answered in the affirmative in order to find a violation of the Act. Has there been a price discrimination? Has it produced at least one of the effects specified in the Act? These questions will be taken up in order.

Strictly speaking there is a discrimination *in price* when there is *any* difference in price to *any* buyer for the dictionary tells us[108] that to discriminate is to mark a distinction, a difference, and when that is applied to price, any difference would seem to be enough. The Act, however, mollifies somewhat the rigors of the dictionary in its other provisions. Thus, there is no discrimination in price within the meaning of the Act unless the difference be as to "commodities of like grade and quality." We merely learn from this that a seller may make a different price for his shaving soap than for his bath soap and there is room for many interpretations in the twilight zone of meaning of these words.

Also, there is no discrimination in price if the discrimination makes "only due allowance for differences in the cost of manufacture, sale or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered." This provision is of great importance and is pregnant with lawsuits. The straight quantity discount was an effective escape from the perplexities of old Section 2[109] but now it may be justified only if it makes "only due allowance" for differences in cost of manufacture, sale or delivery. The cost accountant will be called upon to develop a technique to make some showing of a cost difference on which to base a price difference and the battle will be over the items that may be included in the accountant's tables. The outcome will depend on how exacting the courts turn out to be.[110] The words of the Act do not foreshadow the result but the common sense of the judges is apt to call a halt to disputation when some fairly approximate result has been reached for otherwise litigation might well lose sight of the broad objective in a welter of the accountant's tables. The objective would seem to call for no more than some reasonable or approximate relation between the schedule of quantity discounts and the savings in cost that the quantity

[108] The writer consulted WEBSTER'S NEW INTERNATIONAL DICTIONARY (1928).

[109] This point has been discussed by the writer, *op. cit. supra* note 105.

[110] The type of controversy that must inevitably arise is foreshadowed in the proceedings of the Federal Trade Commission against the Goodyear Tire and Rubber Co. See GEORGE, THE FEDERAL TRADE COMMISSION DECISION IN THE GOODYEAR CASE (Dun & Bradstreet, Inc., 1936).

sold or the method of sale may make possible. The quantity discount is thus preserved to the mass distributor, and others too, but its preservation carries with it the burden of relating it to some saving in cost. By calling a discount a quantity discount the seller does not foreclose further inquiry for the assumption of the Act is that a so-called quantity discount is not a quantity discount at all but is rather a discriminatory price unless the seller is able to show that it reflects some saving in cost.[111] Cost is thus the exclusive touchstone of the validity of this discount. A host of practical problems will follow in the wake of this principle.[112]

The functional discount is of long standing in marketing practice. It involves a classification of the seller's customers according to the functions performed by members of the class and the granting of a different discount to the different classes. If a customer is classified as a wholesaler he ordinarily gets a more favorable discount than if he is classified as a retailer. There is, then, even in this simple case, an obvious price differential and *prima facie,* at least, this is a price discrimination within the meaning of the Act. The difficulties grow out of the fact that there are no closed categories of wholesalers or of retailers. Wholesalers may be general or short line; they may maintain warehouses and perform other services or they may not; they may be large or small. Retailers may operate as local, regional or national chains, or as mail-order houses or department stores and the method of operation may involve the performance of functions otherwise performed by a wholesaler. Retailers, too, may be large or small independents and as such they may be loosely or closely organized into cooperative buying and service groups. In this way the symmetry of a simple marketing structure is broken at many points. Functions become blurred and the lines of competition are broken. In this situation there may be many instances in which purchasers of a like quantity are sold at different prices or even in which a purchaser of a greater quantity is sold at a higher price than others for the functional discount, as such, takes no account of the quantity purchased. The classification to be accorded a given purchaser or class of purchasers will often bring to the forefront the struggle between the mass distributors and the so-called legitimate outlets and on a shifting market scarcely any sales policy can be worked out that will not involve some discrimination in the ordinary dictionary meaning of the word. This, as we shall see, does not necessarily stamp it as unlawful but does suggest that it will be difficult to answer the first question, as to whether there has been a discrimination in price, in anything but the affirmative.[113]

[111] This was in substance the position taken by the Federal Trade Commission in its proceedings against the Goodyear Tire and Rubber Co. under old §2 of the Clayton Act. See George, *supra* note 110.

[112] Many of these are discussed in Notes (1936) 36 COL. L. REV. 1285, 1304; (1937) 46 YALE L. J. 447, 455. There is also the provision empowering the Federal Trade Commission to fix and establish quantity limits which may not be exceeded but this depends on a finding that "available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce," Robinson-Patman Act, §1(a).

[113] This analysis is based on the language of the Act and on a study of the comparable language of old §2 and has been discussed with reference to available court decisions by the writer, *op. cit. supra* note 105. Most commentators prefer to state that there is no "discrimination" within the meaning of the Act

There are three other provisions that deserve brief mention. One deserves mention only that it may be dismissed. That is the provision that recognizes the right of the seller to select his customers. One court[114] thought that this might justify a discrimination between customers selected but that seems wrong. It imports no such thing. Another provision justifies price differentials as applied to sales of perishables and seasonal goods, distress sales and sales of discontinued lines. The last provision permits a seller to rebut a *prima facie* case of price discrimination by showing that the different price was made "in good faith to meet an equally low price of a competitor or the services or facilities furnished by a competitor." There is dispute as to whether this merely establishes a rule of procedure or whether it constitutes an absolute defense to a charge of discrimination.[115] Whatever the outcome may be there is nothing in the language to suggest that it makes any difference whether the price being met is itself discriminatory or whether a discriminatory price must be made to meet the other price. Without more specific language it is hard to see how the courts can do more than apply it as it stands, no matter at what sacrifice to the effectiveness of the Act, and the sacrifice would be great.[116]

Assuming that a discrimination in price has been made out we come now to the second question, has it produced at least one of the effects specified in the Act? One of the proscribed effects is taken verbatim from old Section 2 of the Clayton Act and that is where the effect "may be substantially to lessen competition or tend to create a monopoly" so that this comes into the new Act loaded with such meaning as has already been given to it by the courts.[117] The other proscribed effects are new and they are "to injure, destroy, or prevent competition with any person who either grants or knowingly[118] receives the benefit of such discrimination or with customers of either of them." There is here no requirement that there be a showing of substantiality.[119] It is enough if competition is injured, destroyed or prevented

unless it has produced one of the prohibited effects. See Thurlow M. Gordon in CONFERENCE PROCEEDINGS, *supra* note 104, at 23, 29; Note (1936) 50 HARV. L. REV. 106; Smith, *The Patman Act in Practice* (1937) 35 MICH. L. REV. 705, 708. These commentators generally quote the statement of Representative Utterback in 80 CONG. REC. 9559 (June 15, 1936) to the effect that a "discrimination" is more than a mere difference and implies some relationship between parties that entitles them to equal treatment. It seems to the writer that Representative Utterback's idea is taken care of by the requirement that, in order to constitute a violation of the Act, the "discrimination" must produce certain effects on competition. It is the disturbance of a relationship of competition that is important. It probably does not matter very much which view is taken. The writer simply prefers to give the word "discrimination" its ordinary meaning and direct attention to the effect of the "discrimination" on competition.

[114] Mennen Co. v. F. T. C., 288 Fed. 774 (C. C. A. 2d. 1923), *cert. denied*, 262 U. S. 759 (1923).

[115] See Notes (1936) 36 COL. L. R. 1285, 1311; (1936) 50 HARV. L. REV. 106, 117; Thurlow M. Gordon in CONFERENCE PROCEEDINGS, *supra* note 104, at p. 33.

[116] One must not be too dogmatic on this point, however, and commentators foresee the possibility that the contrary view may be taken. See note 115, *supra*.

[117] This has been discussed by the writer, *op. cit. supra* note 105.

[118] The presence of this word is puzzling. It is thought to be inadvertent in Note (1937) 46 YALE L. J. 447, 450. In Note (1936) 50 HARV. L. REV. 106, 108, it is thought that it will have to be disregarded completely in order to avoid unintended consequences.

[119] It may be said that under old §2 of the Clayton Act the requirement of substantiality was met by a showing, without more, of injury to a particular competitor and Sidney-Morris & Co. v. National Ass'n

and, of these, injury is the most susceptible of proof and therefore the most drastic from the point of view of the seller.[120] The courts will have to fashion some specification of the kind and degree of proof required to show injury to competition and the task will not be easy for if the injury is caused in any field of competition, whether of the vendor, the vendee or even of the sub-vendee, that is enough. If this provision is given a literal application it will require the seller so to fashion his price policy that it will not produce injury to competition at any step in the process of getting his product to the consumer. When the seller is charged with responsibility for the consequences of his own price policy in the field of competition in which he and his vendees are engaged, there can be no complaint but when to this is added responsibility for the policies of his vendee it would seem that this could not stand without some showing of complicity of the vendor with his vendee. Without this there is a bare attempt to fasten responsibility on one for the acts of another whom he cannot control or direct but with it there is a division of responsibility among those who caused and made possible the forbidden discrimination. The rigors of even such a temperate construction of the Act may well cause the courts to be exacting in requiring proof of a causal relation between the price discrimination and the fact of "injury" to competition.

In all cases the effect must be on "competition" and here the courts will be required to draw in some way the lines that mark the fields of competition. This will be particularly troublesome where functions often performed by different persons are absorbed into one hand. For example, is a retail chain store that buys direct from a manufacturer in competition with an independent wholesaler? Is a cooperative buying pool of retailers in competition with an independent wholesaler when it buys direct from the manufacturer? Many more such questions will arise in the administration of this act and space does not permit of their discussion.[121]

This much, however, may be said. The salvation of functional discounts and of other practices of long standing in trade will depend upon the conclusions reached by judges on the many and important questions that will arise under the Act. This result is foreshadowed by the provisions for its enforcement. The Robinson-Patman Act is an amendment to Section 2 of the Clayton Act and, as such, it is enforceable by the same diverse methods. Two agencies of the government are expressly charged

of Stationers, 40 F. (2d) 620 (C. C. A. 7th, 1930), points to that result. That case, however, involved the threatened elimination of the competitor. Query whether the "injury" contemplated under the new law will have to go that far. *Cf.* Evans, *supra* note 106, at 151.

[120] There is analogy in §4 of the Clayton Act permitting a suit for treble damages to be brought by any person "who shall be *injured* in his business . . ." by reason of any violation of the anti-trust laws. In treble damage suits the Supreme Court has insisted on a definite showing of a causal connection between the wrong and what the court called "the fact of damage" but when this has been shown proof addressed to the quantum of damage need not be strict. See Story Parchment Co. v. Patterson Parchment Paper Co., 282 U. S. 555 (1931); American Can Co. v. Ladoga Canning Co., 44 F. (2d) 763 (C. C. A. 7th 1930), *cert. denied*, 282 U. S. 899.

[121] Many possibilities are discussed in Note (1936) 36 COL. L. REV. 1285, 1294-1297, and it is predicted that a requirement of substantiality will be read into the Act. With this the writer concurs. This is a familiar device of the courts in dealing with anti-trust laws.

with its enforcement. The Attorney General may proceed by bill in equity in the District Court to prevent and restrain violations.[122] The Federal Trade Commission may proceed by the issuance of a complaint followed by the steps that govern other proceedings by the Commission.[123] In addition, private parties may bring suits to recover statutory treble damages or may seek injunctive relief against threatened loss or damage.[124] It is plain that in proceedings initiated by the Attorney General or by private parties the judges alone will be called upon to develop the meaning of the Act. The part played by the Commission in proceedings initiated by it will be no greater under this amendment to Section 2 than it was under the original section. The meaning of the original section was always a question of law for the judges.[125] The result is that the rules of trade will be judge-made and it is apparent that the general words of the Act point only in a general direction and not to a particular result in a concrete case. Under the Act there is transferred to the judges a broad discretion in influencing important marketing policies and, if it should turn out that the judges are not expert in these matters, the blame must rest on the lawmakers who made such a law as this.

In view of its relatively limited objective the Act is hard to understand. It applies to all sellers and is drawn in language that will give but little assistance to the judges in resolving important conflicts over marketing policies and practices. It draws within its ambit matters that lie outside the particular objective of the Act. It is another example of legislation in universals in a field in which, as the Act only too abundantly shows, universals are difficult to formulate and if applied indiscriminately may produce unsought consequences. It will be years before the products of the judicial process will be susceptible of formulation into any usable pattern of sales policies. The habits of mind that prevail in the courtroom are ill adapted to the difficult task of giving meaning to the vagaries of this legislative product. Flexibility in the formulation and application of rules as to price policies would seem to be a more workmanlike procedure.[126] Policies and practices vary from in-

[122] Clayton Act, *supra* note 105, §15.

[123] *Id.* §11. Under this section the Commission is required to hold a hearing on the complaint and if a violation of the Act is found, it must make a report in writing stating its findings of fact and shall then issue a cease and desist order. If the order is violated the Commission may apply to the Circuit Court of Appeals for the enforcement of its order or the person against whom it is directed may obtain a review on a similar application. In either event there must be filed in court a transcript of the entire record before the Commission and the Act recites that "The findings of the Commission . . . as to the facts, if supported by testimony, shall be conclusive," but the courts have always reached their own conclusions on the record as to the construction of the Clayton Act. See Mennen Co. v. F. T. C., 288 Fed. 774 (C. C. A. 2d, 1923), *cert. denied*, 262 U. S. 759 (1923); National Biscuit Co. v. F. T. C., 299 Fed. 733 (C. C. A. 2d, 1924), *cert. denied*, 266 U. S. 613 (1924), for the only two cases to reach the courts involving Commission proceedings under §2.

[124] Clayton Act, *supra* note 105, §§4, 16.

[125] It is notable that a large number of the cases under the original Section 2 were private suits for treble damages or injunctive relief. See especially the important cases of Van Camp & Sons v. American Can Co., 278 U. S. 245 (1929), and American Can Co. v. Ladoga Canning Co., *supra* note 120.

[126] There is one provision for flexibility in the power granted to the Federal Trade Commission to fix quantity limits for quantity discounts under certain conditions (see note 112, *supra*) but this deals with only a small part of the field covered by the Act.

dustry to industry and without understanding and study of the conditions under which a given rule must operate and its probable consequences, rule-making is apt to be crude and clumsy. Judicial inaptitude is, then, but the penalty for legislative inaptitude. "Common sense," to use the expression of the Supreme Court in a notable opinion,[127] requires that if this power of control is to be exercised at all it be vested in an administrative body empowered to legislate for the particulars of a given trade or industry.

VII. THE "FAIR TRADE" MOVEMENT

The Fair Trade Acts[128] partake of the economic motivation of the Robinson-Patman Act. They are simply different legislative manifestations of similar forces. We have noted that the impulse for the Robinson-Patman Act came from the effort of the independents in the marketing structure to deprive the mass distributor of a competitive advantage attributed to special prices that the independents were unable to secure. The Fair Trade Act is concerned primarily with retail trade.[129] It casts the protecting mantle of the state around one class of retailer, he who will sell goods for not less than the price stipulated by the producer of the goods. All other retailers, be they mass distributors or fellow independents, are branded as unfair competitors. In the language of the trade, they are "price cutters."

In the typical statute[130] the legislative mantle does not cover all goods but only those that bear the "trade-mark, brand, or name of the producer" and that are "in fair and open competition with commodities of the same general class produced by others." With these limitations the statutory scheme permits, and it is only permissive, the producer to fix the price at which his goods shall be sold at each step in the process of getting them into the hands of the consumer. When the producer has set up this contractual marketing structure all others who have notice of it must conform even though they are strangers to the contractual arrangement.[131]

It must be left to the economist and business man to debate the economic merits and demerits of resale price maintenance. That there is much to be said on both sides is evidenced by the vast literature that this subject has called forth.[132] The courts, both state and federal and under both state and federal anti-trust laws, have generally, though not universally, tagged agreements such as may be made under

[127] J. W. Hampton, Jr. & Co. v. United States, 276 U. S. 394 (1928).

[128] The laws of the thirty-one states now having Fair Trade Acts are conveniently collected in C. C. H., TRADE REGULATION SERVICE, Vol. I, State Fair Trade Acts.

[129] This is not to say that these acts do not apply equally to sales at wholesale and otherwise. The statement in the text is made to direct attention to the primary legislative objective.

[130] The California Act which has been so widely copied is used in the analysis that follows. See Cal. Stat. 1931, c. 278, p. 583; CAL. GEN. LAWS (Deering, 1931) no. 8782, as amended by Cal. Stat. 1933, c. 260, p. 793.

[131] The constitutionality of the Illinois and California Fair Trade Acts has been sustained. Old Dearborn Distributing Co. v. Seagram-Distillers Corp., 57 Sup. Ct. 139 (1936); The Pep Boys, Manny, Moe and Jack v. Pyroil Sales Co., 57 Sup. Ct. 147 (1936). Discussions of the problems that will arise under these acts will be found in Notes (1936) 36 COL. L. REV. 293; (1936) 45 YALE L. J. 672; Elliott, *Fair Trade and Resale Price Maintenance* (1936) 10 So. CAL. L. REV. 1.

[132] Most of it is cited in Note (1936) 36 COL. L. REV. 293.

the Fair Trade Acts as in "restraint of trade" and under the guise of the compulsion of these and other non-compelling words the judges have taken sides in the debate.[133] In 1933 the California legislature started a movement in the opposite direction when it put teeth into its 1931 Fair Trade Act and set up a statutory scheme which, at this writing, has been copied in thirty-one states and the end is not yet.[134]

Things like this do not just happen and we must go back to trace the forces that brought about this epidemic of laws. If the distributors of Dr. Miles' medicines in 1911[135] sought the protective mantle of his contracts it was only to protect themselves against their fellow independents who cut prices. In the years that followed the mass distributor became an even greater threat to the position of the "legitimate" distributor. The Federal Trade Commission made this clear in 1929 and in later reports.[136] The producer too, the Commission found, would be glad to have this contractual arrangement made available to him. It looked for a time during the 1920s as though there might be a Congressional reversal of the position taken by the court under the Sherman Act[137] but it remained for the ubiquitous N.R.A. to codify the demand of organized retailers into a provision outlawing price cutting "below cost."[138] The code served to crystallize the demand of retailers for protection against the ever present "price cutter" and the ever growing mass distributor whose disturbances were all the greater in the disorderly markets during the depression. But experience under the cost protection principle of the code was unsatisfactory and the goal of a stable retail market seemed more likely to be reached if resale prices could be fixed and maintained. Attention was shifted to this device and it has been under this new sponsorship of organized retailers that the movement for Fair Trade Acts has spread so rapidly and so successfully.[139] As such it bears but a superficial likeness to the struggle over Dr. Miles' contracts in 1911. And it is under the same sponsorship that the movement in the present Congress to remove resale price agreements from the prohibitions of the Sherman Act has a vitality that was lacking in earlier efforts to the same end.[140]

There has also been an epidemic, though a less virulent one, of Unfair Practices

[133] Authorities will be found collected in Note (1936) 45 YALE L. J. 672.

[134] *Supra* note 128.

[135] *Dr. Miles Medical Co. v. Park & Sons Co.*, 220 U. S. 373 (1911), is the leading case in which the Supreme Court declared a contractual resale price arrangement to be in violation of the Sherman Act.

[136] FED. TRADE COMM'N, REPORT ON RESALE PRICE MAINTENANCE (1929), Pt. I, p. XII, c. VI. In response to a Senate Resolution of 1931 the Commission submitted 33 factual reports on various phases of chain store operations and practices. The story of the growth of chain stores is told in Fed. Trade Comm'n, *Growth and Development of Chain Stores*, SEN. Doc. No. 100, 72d Cong., 1st Sess. (1932).

[137] The course of these measures is reviewed in SELIGMAN AND LOVE, PRICE CUTTING AND PRICE MAINTENANCE (1932).

[138] See General Code of Fair Competition For the Retail Trade, Art. IX, 1(c), Art. VIII. These prohibited price cutting below cost and the use of "loss leaders."

[139] An outstanding discussion of the forces that brought about the California Fair Trade Act and experience under it is presented in Grether, *Experience in California with Fair Trade Legislation Restricting Price Cutting* (1936) 24 CALIF. L. REV. 640.

See also Grether, *Solidarity in the Distributive Trades in Relation to the Control of Price Competition*, *infra*, p. 375. ED.

[140] The Miller-Tydings bill, H.R. 1611, is now pending in the Congress.

Acts and they are part and parcel of the same movement. At this writing ten states have such laws.[141] For the typical act we again turn to California for in 1935 that state refashioned its earlier laws[142] and produced the act that has been substantially copied in the other states. The Fair Trade Acts, as we have seen, permit vertical control of the price of trade-marked goods but, while horizontal control is expressly denied in those acts, it is evident that effects will be felt in the horizontal price level. The great objective is, after all, a stable retail market and that means one in which neither the mass distributor nor the "price cutter" shall, by his practices, gain what is deemed an unfair advantage. The Unfair Practices Act is directed at the horizontal level of prices and, unlike the Fair Trade Act, it applies to all goods. Its most novel and important provision prohibits sales below "cost," and that term is defined, "for the purpose of injuring competitors and destroying competition." Another provision outlaws price discrimination "with the intent to destroy . . . or to prevent the competition of any person" but this precursor of the Clayton and Robinson-Patman Acts has long been familiar in state anti-trust laws.[143] Secret rebates, refunds, unearned discounts, and the like, are prohibited in another section.

The cost protection principle of this act is but the provision of the N.R.A. Retail Trade Code[144] in a new dress and it is directly traceable to it. The new dress is the provision that the sale below "cost" must have been made "for the purpose of injuring competitors and destroying competition." There will be troubles enough in determining "cost"[145] and when to this is added the showing of purpose it is evident that there is more of hope than of realization in this act. Only the most liberal judicial notions as to the requisite showing of the condemned purpose will make of this act an effective and usable instrument. If the judges can be persuaded to accept, without more, the fact of sales below "cost" as sufficient evidence of the wrongful purpose then the act may serve to put a floor under retail markets[146] and to this extent it will contribute to the maintenance of a vertical price established under the Fair Trade Act. But if the judges are insistent upon a definite showing

[141] These Acts are collected in C. C. H., TRADE REGULATION SERVICE, Vol. I, State Anti-Trust Laws, for the following states: Arkansas (1937), California (1935), Connecticut (1935: limited to the retail drug trade), Kentucky (1936), Louisiana (1936: limited to the retail drug trade), Montana (1937), Oregon (1937), South Carolina (1932), Tennessee (1937) and Wyoming (1937). The Arkansas, Kentucky, Montana, and Wyoming laws are copied from the California law. Oregon and Tennessee have introduced variations in the statement of the unlawful purpose or effect while Connecticut and Louisiana have gone the whole way and prohibited sales below cost, as defined, without any requirement of a wrongful purpose or effect.

[142] In 1933 California adopted a Sales Below Cost Act, Cal. Stat. 1933, p. 1280-1281, which was strengthened and incorporated in the Unfair Practices Act of 1935, Cal. Stat. 1935, c. 477, p. 1546. An excellent discussion of experience in the drug and grocery trades under the California Act appears in Grether, *supra* note 139, at 656-659, 685; see also Cupp, *The Unfair Practices Act,* (1936) 10 So. CALIF. L. REV. 18.

[143] Provisions prohibiting price discrimination will be found in the anti-trust laws of a great many states. See C. C. H., *supra* note 141.

[144] *Supra* note 138.

[145] Many of these troubles are discussed by Grether, *supra,* note 139, at 686-690, with particular reference to the problem as to whether "cost" is to be an average or an individual figure and the pitfalls of each alternative.

[146] In the hands of an aggressive trade association this may be accomplished. See *id.* at 656, and 685.

of the wrongful purpose it is likely that the act will be a disappointment to its proponents. The troublesome phrase may have grown out of doubts as to the constitutionality of a flat prohibition of sales below "cost"[147] but experience may show that the constitutional hurdle will have to be met directly if the objective is to be gained.

Our survey of price control by law has taken us through a great variety of measures undertaken at different times and with various particular objectives. If any one thread runs through these measures it is that the price at which goods are sold and services furnished to the public is a matter of public concern and, if need be, of governmental action. The particular objective is quickly merged in a continuing policy of control and as precedent grows on precedent it becomes more evident that there is nothing sacrosanct about price. It affects so many interests, those of producer, wage earner, distributor and consumer alike, that the power of control carries with it a vast power over the economic and social destinies of the nation. Price itself may be said to be "affected with a public interest," to resurrect a now outmoded phrase. This has been the great objective of the measures we have reviewed.

Price is not an abstraction. It is a very real force in economic and social life and it makes itself felt in a variety of ways. It may be a weapon of oppression of the weak by the strong; or it may be a competitive weapon that has grown too strong for those who wield it and, uncontrolled, may threaten the security of the industry or trade on which weak and strong alike depend. And price is unruly, not easily subjected to control by either government or private interests.

These considerations, and many others, are reflected in the measures that have been adopted by government. In the great transportation and public utility fields government has attempted to deal with price directly. In the great fields of industrial enterprise, trade, and agriculture government has sought to condition forces that are thought to play an important part in its determination. In the first type government has acted generally through an administrative body vested with broad powers of control but in the second the typical instrument is the penal or civil statute. The important statutes in this last field are but little more than broad mandates to the judges that leave to them the difficult task of giving direction to important forces in our economic life as concrete cases come before them for decision. In this process important questions of economic policy, unanswered by the broad mandates of the statute, must await the contingencies and limitations of the litigated case and years may pass before any answer is forthcoming. This must not be taken as a pat plea for certainty and definiteness for that plea is apt to be vain and illusory. It is a plea that government, if it is to act at all in these matters, fashion its instruments of control with more sureness. There is no quarrel with the broad mandates of the statutes for in them there is strength and adaptability to new conditions. A bill of particulars has little place in a statute in this field. It may be a source of

[147] See Fairmont Creamery Co. v. Minnesota, 274 U. S. 1 (1926). Connecticut and Louisiana are the only states that have taken this constitutional chance. See note 141, *supra*.

weakness and merely deflect the course of trade practices into other, and equally undesired, channels. The quarrel is, rather, with the legislature that is content to entrust its mandates to the judges alone who must deal with them only in terms of the issues presented in the course of particular cases involving particular parties. In this process there is little opportunity for broad study of the consequences that may follow from a choice that must be made among competing alternatives and when the choice has been made the result may be a satisfactory solution of the particular problem before the court but it may produce wholly different and unsought consequences in other industries and trades. There is instruction in the methods of government when direct control of price is attempted. It is recognized that the legislative process is unsuited to ordain the details of control and must limit itself to a broad mandate to an administrative body. The important details of legislation may then be written in orderly fashion by those whose sole responsibility is to give meaning to the legislative mandate in the light of the varying conditions that may be revealed after careful study, and there is opportunity to refashion and adapt as experience points the way. There are equally cogent reasons why a similar instrument should be fashioned when other and equally difficult controls are attempted in the complicated and ever changing fields of industry and trade. Possibilities along these lines are virtually untried and unexplored.

THE ANTI-TRUST LAWS AND THE REGULATION OF PRICE COMPETITION

Arthur Robert Burns*

I. The Principle of the Sherman Law

Direct social control of the industrial system presents dismaying difficulties and dangers. The National Recovery Administration revealed the complexity of the economic problems that arise when conflicts of self interest are replaced by direct governmental planning. The political consequences of a high concentration of economic power in the state are less clear but no less disquieting. Efforts to meet the growing criticism of the industrial system while avoiding these difficulties and dangers[1] have taken a peculiar form in the United States. An effort has been made to preserve by law the conditions necessary for the continuance of competition. If the prerequisites of competition could be preserved detailed controls of industrial policy would, it was hoped, be avoided. Direct appraisal of the treatment of the buyer would be unnecessary. Experience of this policy has, however, revealed the difficulty of giving specific meaning to the comfortable phrase of the economists, "assuming free competition." It has brought disillusionment because of the increasingly wide divergence of actual business conditions from the free competition of economic theory. In consequence social policy shows signs of transformation into a policy of regulating an admittedly imperfectly competitive world.

The prerequisites of competition have recently been reëxamined by economists and prove to be very difficult of attainment. There must be a perfect market in the sense that, in the absence of general changes in the conditions of demand and supply, a slight reduction in price by one firm would shift all business in the market to that firm. Buyers may have no loyalties to sellers or preferences for the product of any one of them and they must be exceedingly well informed. Sellers must be sufficiently numerous for none of them to find it profitable to take account of the effect of changes in his output upon the market price.

*B.Sc. (Econ), 1920; Ph.D., 1926, University of London. Assistant Professor of Economics, Faculty of Political Science, Columbia University. Author of *The Decline of Competition* (1936).

[1] Centralized control of monetary policy has been increasingly relied upon during the present century to provide a broad control of the industrial system without direct and detailed interference with initiative. Marriner S. Eccles, Chairman of the Federal Reserve System, has now, however, declared that the Federal Reserve System is powerless to maintain a stable economy unless other essentially non-monetary factors necessary to stability are brought into line either by private interests or the government. Statement in *N. Y. Times*, March 16, 1937, p. 9.

The Sherman Act,[2] the first federal anti-trust law, was passed in response to evidence that business was evolving away from these conditions. Market control had been obtained in some industries by the concentration of a large proportion of the business in single firms. In others, firms had become sufficiently few to get together in pools and agree upon prices. Two major explanations of these tendencies were possible. On the one hand, they might be attributed to changes in technology. Business men competing with each other in the effort to utilize the most economical methods of production had developed firms large enough to make it necessary for them to take account of their power over the market price. Where goods are costly to transport the markets of firms are not nationwide; even where there are many firms in the country as a whole there may be few in each local market. This explanation suggests that competition has in fact frequently proved to be self-destructive. Efforts to maintain the prerequisites of competition in these circumstances would not yield the fruits of competition which are the ultimate objective of social policy. If large firms are the most economical, any limitation, direct or indirect, upon opportunities to attain the most economical size hamper the initiative of individuals and obstruct the utilization of the most economical methods of production.

The alternative explanation of the declining numbers of firms is that they have increased in size by resort to tactics which have little relation to their economies in production. This interpretation of the events between the Civil War and 1890 suggested changes in law to prevent resort to these practices. Only the fittest would then survive and they would be numerous enough to satisfy the requirements of competition. Such appears to be the basis of the Sherman Law. It raises the question why a moral lapse should have occurred soon after the Civil War, and suggests to the enquiring mind the possibility that it may have been connected with the revolution in methods of transportation which widened markets and facilitated the utilization of large scale methods of production. Drastic methods were undoubtedly used, but they may have been due to the great economies in production methods then made available if rapid industrial concentration could be effected. The survival of large firms since that time and the rise of others suggest that they have maintained themselves either because of superior efficiency or because of continued buccaneering tactics. Either the Sherman Law has failed as a means of eliminating these tactics or the economies of large scale production have been very important. But with the latter conclusion we return to the first explanation of the decline of the competitive market.

II. Price Competition under the Sherman Act and Federal Trade Commission Acts

A. Price Policies

The attempt by law to preserve the competitive market was expressed in a condemnation of contracts, combinations or conspiracies in restraint of interstate commerce. Monopolizing, or attempting to monopolize, or combining or conspiring

[2] 26 Stat. 209 (1890), 15 U. S. C. §§1-7.

to monopolize any part of interstate commerce was similarly declared illegal. By the courts "it has repeatedly been held . . . that the purpose of the statute is to maintain free competition in interstate commerce."[3] Behind the assumptions of free competition by the economists lay an assumption of the existence of private property. Congress was faced with the problem of writing a commercial code determining the precise set of rights and duties which would constitute the kind of private property necessary to produce the results of competition. By the vague wording of the statute it passed this problem to the courts. In the course of their efforts to solve the problem they were presented with the question whether certain price policies were in violation of the assumption of free competition. They have consistently refused to appraise price policies in terms of profits. Had they not taken this position they would speedily have been involved in the regulation of prices and the problems presented by such regulation in the industries which they have decided to be affected with a public interest. They have, however, sought to test price policies in terms of the intentions of the parties. An intent to drive out a rival is evidence of attempts to restrain trade or create a monopoly.[4] The basic difficulty of this policy lies in the vagueness and even inappropriateness of the criterion of intent. In times when speedy concentration of industry is induced by recognition of the economies of large scale production price cutting tactics may be drastic enough to persuade the court that it smells an evil intent. But the attainment of the economies of mass production may be the ultimate inducement to adopt such policies. Not all buccaneering tactics can be excused on this basis but the touchstone used by the court does not distinguish the vigorous pursuit of the economies of size from the vigorous pursuit of monopoly profits.

The policy of the courts tends to encourage the attainment of the economies of production by other methods than price cutting. In general they have been unwilling to interfere with mergers or to break up very large firms.[5] The smaller firms instead of being driven out tend to be bought out with consequent advantage to their owners but not necessarily to the consumer.[6] Concentration has, therefore, not been prevented and price behavior in sharp contrast with that in the competitive market has appeared. "When the courts have been presented with evidence of such

[3] American Column and Lumber Co. v. U. S., 257 U. S. 377, 400 (1921). *Cf.* "The theory of the anti-trust laws in their modern orientation is that, in the absence of adequate governmental control upon a monopolistic basis, the influence of government should be exercised to keep the markets free to all on a competitive basis." McLaughlin, *Legal Control of Competitive Methods* (1936) IOWA L. REV. 302.

[4] The price wars in the tobacco industry were regarded as contributory evidence of intent to monopolize. U. S. v. American Tobacco Co., 221 U. S. 106 (1911). The intent of the Corn Products Refining Company to monopolize was inferred in part from sales below cost and the company was forbidden to resort to low price campaigns. U. S. v. Corn Products Refining Co., 234 Fed. 964 (S. D. N. Y. 1916). The Steel Corporation was held to be a "good trust" partly because it had not indulged in secret price cutting. U. S. v. U. S. Steel Corp., 251 U. S. 417 (1920). The contention that the International Harvester Company had not used its power to restrain trade was supported by the claim that it had not reduced prices below cost for the purpose of driving out competitors. U. S. v. International Harvester Co., 274 U. S. 693 (1927).

[5] Even where firms have been broken up the number in the market has frequently remained small.

[6] *Cf.* Burns, *The Process of Industrial Concentration* (1933) 47 Q. J. ECON. 277.

contrasts they have not regarded it as evidence of the failure of the policy of maintaining the prerequisites of competition. The Supreme Court dismissed with brusque contempt evidence that the price of steel rails had been stable for many years,[7] and in the same case it declared that "the law does not make mere size an offence."[8] Likewise it has held that price leadership "does not establish any suppression of competition or show any sinister domination."[9]

The policy of maintaining the prerequisites of competition by the control of industrial practices also provides the foundation of the Federal Trade Commission Act.[10] This act empowered the Federal Trade Commission to prevent unfair methods of competition. The Commission has also made a few, but none too successful, attempts to deal with price policies regarded as unfair. Apart from the cases concerning price discrimination which were taken under the authority of both the Clayton[10a] and Federal Trade Commission Acts it has made little progress in establishing a criterion of fairness in price policies. It ordered a large distributor to cease selling sugar at a loss during the war, the sales being in combination with other sales, but it was not upheld by the court.[11] It ordered a seller to cease selling at less than the price charged by a rival on the ground that the price was not set in good faith.[12] The acceptance by the Commission in 1928 and 1929 of Trade Practice Conference rules against less than cost selling indicates pressure for such rules and the willingness of the Commission to condemn the practice.[13]

B. Cooperative Control of Prices or Output

Agreements between sellers concerning prices and output have generally been condemned without regard for the reasonableness of the policy pursued. The Supreme Court has stated that it would hesitate, in the absence of express legislation, to make the difference between legal and illegal business relations "depend upon so uncertain a test as whether prices are reasonable—a determination which can be made only after a complete survey of our economic organization and a choice between rival philosophies."[14] Nevertheless, some six years later the Court retired from this position and decided that "the mere fact that the parties to an agreement eliminate

[7] U. S. v. U. S. Steel Corp., 251 U. S. 417 (1920).

[8] *Id.* at 451.

[9] U. S. v. International Harvester Co., 274 U. S. 693, 709 (1927).

[10] 38 STAT. 717 (1914), 15 U. S. C. §§41-51. [10a] 38 STAT. 730 (1914), 15 U. S. C. §§13-13a.

[11] F. T. C. v. Sears Roebuck & Co., 1 F. T. C. 163 (1918), 258 Fed. 307 (C. C. A. 9th, 1919). The court held that the Commission had no power to proceed against sales below cost but that misrepresentation in connection with such sales was illegal.

[12] F. T. C. v. The Oakes Co., 3 F. T. C. 36 (1920).

[13] NAT. INDUSTRIAL CONF. BD., THE PUBLIC REGULATION OF COMPETITIVE PRACTICES (1925) 64. In both policy and form of administration the Commission anticipated the subsequent National Recovery Administration.

[14] U. S. v. Trenton Potteries Co., 273 U. S. 392, 398 (1927). "The power to fix prices, whether reasonably exercised or not, involves power to control the market and to fix arbitrary and unreasonable prices." *Id.* at 397. Conditions may change and a price once reasonable may be maintained and become unreasonable. If power to fix prices depended upon the reasonableness of the prices the government, in enforcing the Sherman Law, would be compelled to shoulder the "burden of ascertaining from day to day whether it has become unreasonable through the mere variation of economic conditions." *Id.* at 398.

competition between themselves is not enough to condemn it."[15] The Court took into account the peculiar nature of the bituminous coal industry, its excess capacity, its difficulties in meeting the competition of oil, gas, and water power, and its "chaotic condition." "The fact that the correction of abuses would lead to fairer price levels does not mean that abuses should go uncorrected or that cooperative endeavor to correct them necessarily constitutes an unreasonable restraint of trade."[16] The establishment of a cooperative selling agency including a large number of the sellers in one field was held, therefore, not to be illegal. But the Court provided that the case should remain open so that evidence of any attempt by the agency to abuse its position might be brought before it. Apparently in this case the Court, interpreting the Sherman Act, has embarked upon a journey towards the control of prices, although that control is indirect and tentative.

III. RESALE PRICE MAINTENANCE

During the past decade the courts have been called upon to decide whether a seller may, without contravening the Sherman or Federal Trade Commission Acts, control the price at which his product is resold by the buyer. The very existence of the problem on a scale stimulating litigation is an indication that the prerequisites of competition have not been preserved on the selling side of the market. In fact the imperfections of competition between sellers have been tacitly accepted and policy has been framed partly in terms of the forms of business organization and partly in terms of the control of the policies of sellers in imperfect competition with each other in the hope of maintaining the prerequisites of competition at the next stage in the distributive process. Decision in terms of forms of organization has, however, enfeebled efforts by manufacturers to maintain competition at the next stage by restricting them to a variety of not entirely effective methods. At this next stage, however, there has been in process a reorganization which has threatened with expulsion small scale distributors and their suppliers. These threatened groups have recently induced legislation giving more effective power to manufacturers of branded consumer goods to preserve the lives of small scale distributors. Thus the imperfection of competition at one stage is not only accepted but utilized with the object of maintaining the number of distributors. The control of the organization of distribution is coming, therefore, to rest partly in the hands of manufacturers.

The efforts of the courts to rest their decisions upon legal forms rather than economic consequences are indicated in a brief series of cases. Contracts providing for price maintenance are held to be contrary to the Sherman Law because they restrain trade between the buyers.[17] The same result is beyond the reach of the law if the manufacturer merely urges retailers to maintain suggested prices, announces that dealers failing to maintain these prices will be denied supplies and

[15] Appalachian Coals Inc. v. U. S. 288 U. S. 344, 360 (1933).

[16] *Id.* at 374.

[17] Dr. Miles Medical Co. v. Park & Sons Co., 220 U. S. 373 (1911); Bauer et Cie. v. O'Donnell, 229 U. S. 1 (1913).

requests information concerning price cutters.[18] Keeping records concerning the behavior of dealers and employing systematic devices for detecting price cutting have been held to approach so nearly in effectiveness to contractual covenants eliminating price competition between dealers as to contravene the Federal Trade Commission Act.[19] But when the dealer is constituted an agent of the manufacturer, the latter is left free to control the resale price without contravening the law.[20]

The constitutionality of legislation specifically authorizing manufacturers to set minimum resale prices has recently been affirmed by the Supreme Court.[21] The decision rests upon the contention that the distributors owned the commodity but not the brand name. They were free to sell the commodity without identifying labels or containers at any price they chose (not a very real alternative). Whether price cutting in the sale of trademarked products was injurious to the goodwill of the producer was "fairly open to differences of opinion" but if states decided that goodwill was thus damaged the method of protection selected was not unconstitutional.[22]

The imperfection of competition among manufacturers rests largely upon the use of advertising to break up the market into a series of submarkets. Each of these submarkets is occupied by one manufacturer and separated from other submarkets by the preferences of buyers for one product rather than another. The absence of such advertising is, therefore, one of the prerequisites of competition. The sellers of unbranded goods in competition are powerless to exact the maintenance of resale prices. The decision of the Court indicates, however, that it realizes that laws permitting resale price maintenance encourage the building up of goodwill by adver-

[18] U. S. v. Colgate & Co., 250 U. S. 300 (1919); U. S. v. Schraders Sons, Inc., 252 U. S. 85 (1920).

[19] Beech Nut Packing Company v. F. T. C., 257 U. S. 441 (1922); Cream of Wheat Co. v. F. T. C., 14 F. (2d) 40 (C. C. A. 8th, 1926).

[20] U. S. v. General Electric Co., 272 U. S. 476 (1926). The Court seeks, however, by examination of the contracts, to ensure that a genuine agency is established. Standard Fashion Co. v. Magrane Houston Co., 258 U. S. 346 (1922); Butterick Co. v. F. T. C., 4 F. (2d) 910 (1925), *cert. denied*, 267 U. S. 602 (1925). *Cf.* BURNS, THE DECLINE OF COMPETITION (1936), 420.

[21] Old Dearborn Distributing Corp. v. Seagram-Distillers Corp., 57 Sup. Ct. 139 (1936). The state of Illinois had passed a "Fair Trade Act" providing that no contract for the sale or resale of branded goods in "fair and open competition with commodities of the same general class produced by others" should be illegal because it contained either of the following provisions: (a) That the buyer would not resell except at a price stipulated by the seller; (b) That the product should not be further resold except at a price stipulated by the producer or first purchaser. Such provisions in any contract were, by the Act, deemed to imply that the commodity might be sold without reference to the contract in three situations, *viz.*, (1) When the owner of the commodity was closing out his stock "for the purpose of discontinuing delivery of any such commodity" provided that the stock was offered to the manufacturer at the original invoice price at least ten days before its sale to the public; (2) When goods were damaged or deteriorated and the public was so informed; (3) When they were sold by an officer acting under the authority of any court. The Act further prohibited wilfully and knowingly offering for sale or selling any commodity at less than the price stipulated "in any contract" pursuant to the above provisions of the Act *whether or not the person so advertising or selling was a party to the contract.* The Act did not authorise contracts between producers, between wholesalers or between retailers as to sale or resale prices.

[22] It was contended on behalf of the dealer that he had been deprived of the right to dispose of his property at any price he might choose. The court blandly replied that, while there would have been constitutional objection to the annexation by the state of this right to fix the price, there was none when the right was transferred from dealer to manufacturer under legislative sanction.

tising. In supporting resale price maintenance state governments and the courts are, therefore, departing from the traditional policy of maintaining competition. They are facilitating the replacement of price competition among manufacturers by competition in advertising.

The struggle between large and small scale organization of distribution has taken the form partly of price competition. The large scale distributors desire freedom to cut resale prices as they may choose. The small scale retailers and their suppliers desire the maintenance of margins that will enable them to survive. If they organize and apply pressure to manufacturers the latter must choose between the large and the small distributors. But the manufacturers are not impartial in this choice. They advertise partly because they are anxious to keep in their own hands some control over the promotion of the sales of their product. They are also fearful of the emergence of small numbers of large distributors who may overpower them. The net outcome of this situation is, therefore, likely to be that manufacturers will endeavor to maintain large numbers of small distributors. By doing so they may prevent the reorganization of distribution upon what may be a more economical basis. High cost distribution, in the form of too many too small outlets, may survive in the interests both of manufacturers and of those threatened with expulsion by the larger firms. Manufacturers are, however, faced with the possibility that the large distributors will establish brands of their own or that they will evade resale price maintenance by combination sales or trade-ins.

The argument that increases in the size of firms are due to unfair practices has arisen in the course of the struggle between large and small distributors. Although resale price maintenance laws go far beyond the exclusion of "loss leaders" these leaders are frequently used as the main justification for the law. "Loss leaders" are condemned by manufacturers who promote their product by advertising. They are irked by the fact that the large distributors find it more profitable to reduce the resale prices of well advertised commodities especially if they have a stated price (*e.g.*, books) than to use other articles as loss leaders. Buyers can make a simple and direct comparison between the cost of the branded goods at large and small stores. Where goods vary in quality and style comparison is a task usually beyond the powers, or even the time, of the retail buyer. By using advertised products as loss leaders large distributors gain a reputation for general low prices more quickly and cheaply than by cutting all prices. Loss leaders may, therefore, be a means of deceiving the buyer into an unjustified belief that a particular store is a cheap store.

In so far as distributors recover a smaller mark-up on loss leaders than on other merchandise there may be price discrimination, although it is discrimination between groups of buyers. Whether or not it constitutes discrimination in fact depends upon the possibility of discovering the correct distribution of the cost of operating a store between dealings in different products and this is an almost impossible task.[23]

[23] Fast moving items like loss leaders can, of course, be handled for a smaller mark-up than slow moving ones without reduction of profit.

Where the dealer handles the product without any mark-up or even resells at a price less than he pays discrimination is undeniable. The dealer argues that this policy is an alternative to advertising and can properly claim that, unlike almost all other forms of advertising, it results in direct gains to the consumer. Moreover, in so far as his policy is deceptive, it can hardly be placed upon a lower plane than a great deal of advertising, most of which raises costs while loss leaders reduce prices. Loss leaders can also be attacked because they represent a temporary policy. Distributors are apt to turn for loss leaders from one product to another. The manufacturer claims that there is no economy in these temporary dislocations of his machinery for distribution. Smaller dealers are discouraged from handling the product during the period of price cutting and when the large distributors have turned to some other product good relations must be rebuilt and expenditure incurred for the purpose.

Thus the code of law aimed at the preservation of the prerequisites of competition is being transformed into one giving to manufacturers in imperfect competition with each other the power to control distribution during a period of reorganization. Within the past four years, legislatures in some thirty-one states have accepted this policy and are at the same time endorsing the advertising that gives the manufacturers their power to set resale prices. The Supreme Court has merely taken the view that if legislators are so disposed their actions are not unconstitutional.

IV. Price Discrimination

A. The Shift from the Preservation of Competition between Manufacturers to the Control of their Prices

Local and other price discriminations were among the practices of which the early trusts were accused. They were appraised by the courts as evidence of the intent of the seller. This approach has already been discussed. In 1914, however, legislative prohibitions upon price discrimination were enacted in Section 2 of the Clayton Act,[24] which has now been replaced by the Robinson-Patman Act of 1936.[25] In part this legislation suggests an elaboration and clarification of the Sherman Act. But these laws go beyond the effort to preserve the prerequisites of competition among manufacurers. They seek to avoid unfair discrimination between distributors. They rest, therefore, like resale price maintenance laws, upon the admitted hopelessness of maintaining anything like perfect competition among manufacturers. The effort to control differentials in price to buyers of different classes rests broadly upon an attempt to adjust the prices of manufacturers to what they might be assumed to be if there were price competition between the sellers. Failure to prohibit price discrimination between ultimate consumers suggests, however, that the old principle lives on.[26] It is hoped to preserve competition among dis-

[24] *Supra* note 10[a].

[25] 49 STAT. 1526 (1936), 15 U. S. C. §§13, 13a, 13b, 21a.

[26] This omission may be of little practical importance. It is of interest mainly as evidence of the survival of the old principle.

tributors and thus to avoid control of retail prices. The effort to maintain competition between distributors, however, coupled with the great political pressure exerted by small distributors and their suppliers who are fearful of elimination, has resulted in severe modifications of the policy of controlling price differentials by reference to those likely under perfect price competition. Price competition between distributors might lead to the survival of a few large units. When the courts were earlier presented with this dilemma in the field of production they chose to pursue efficiency even if it resulted in the weakening of competitive forces in the market. Apparently Congress has chosen the other horn of the dilemma in dealing with the field of distribution. The Robinson-Patman Act contains provisions likely to handicap the development of large distributors. It rests, therefore, upon conflicting principles; it indicates the awkward consequences of efforts to preserve the prerequisites of competition; it admits the inadequacy of past efforts to preserve these prerequisites.

Discrimination has in general been prohibited under both the Clayton and Robinson-Patman Acts when the effect may be to lessen competition substantially or to tend to create a monopoly[27] in any line of interstate commerce.[28] These familiar phrases suggest an effort to continue the basic policy of the Sherman Law making clear its application to a specific practice.[29] The prohibition of discrimination where it may lessen competition or tend to create a monopoly in *any* line of commerce indicates the presence of the new principle above mentioned, namely, the control of price differentials on the selling side of the market in the hope of maintaining the prerequisites of competition at least on the buying side and, therefore, in subsequent markets on the way to the ultimate buyer. This new principle was accepted by the courts only some fifteen years after the Clayton Act was passed and then in a case affecting discrimination between fabricators and not distributors.[30]

In the cases presented to the courts between 1914 and 1929 affecting the relations between manufacturers and the various classes of retailers the courts generally avoided interference with the policies of sellers and assumed that, having maintained competition between these sellers, the middlemen and the consumer had been protected. A purpose to maintain the old channels of trade was held to be illegal in

[27] However, the latter act has, as will be seen, amended the Clayton Act by extending its prohibitions to cover acts the effect of which is "to injure, destroy, or prevent competition," without reference to the substantiality of the effect upon competition or the creation of monopoly. Robinson-Patman Act, §1(a).

[28] This necessary restriction to interstate commerce is already producing a crop of difficulties in pending litigation under the latter act. It is claimed that sellers peddling goods from local branch houses are not engaged in interstate commerce. *Cf.* In Matter of Kraft Phenix Cheese Co., F. T. C. Docket 2935; In Matter of Anheuser Busch Co. F. T. C. Docket 2987. It is also claimed that differentials to retailers if they affect competition between them affect only intrastate commerce. *Cf.* In Matter of Bird & Son, Inc. and Montgomery Ward & Co., F. T. C. Docket 2937.

[29] Continuity with the Sherman Act cases is also evident in the provision in §3 of the Robinson-Patman Act against local discrimination "for the purpose of destroying competition or eliminating a competitor in such part of the United States" and against selling goods "at unreasonably low prices for the purpose of destroying competition or eliminating a competitor." The continuity is verbal rather than one of principle, more particularly in the Robinson-Patman Act.

[30] American Can Co. v. Van Camp Packing Co., George Van Camp and Sons, 278 U. S. 245 (1929). See pp. 310-311, *infra*.

1914.[31] In the majority of subsequent cases, however, little or no emphasis has been placed upon this principle. The line between permissible and illegal discrimination has sometimes been drawn by reference to the legal forms of business organization. It was held, for instance, that a seller may refuse to sell to a cooperative of retailers at any price other than that charged to a single retailer.[32] He may, however, group together for discount purposes the stores in a chain in each locality, even though they require individual canvassing and delivery, and refuse to permit independent retailers to pool their orders for the purpose of calculating discounts.[33]

In some of these and other cases the court has refused to interfere with the price differentials of a seller on the ground that a seller is free to select his customers.[34] The Clayton and Robinson-Patman Acts both explicitly preserve the right if it is exercised in *bona fide* transactions and not in restraint of trade. Of course in a competitive world sellers would be free to choose their own customers but they would be unable to choose on any basis other than the price offered. Where there were differences in the cost of different kinds of business there would be a tendency to a normal rate of return[35] in each. Prices would, therefore, vary in accordance with differences in cost. The courts, presented with evidence that conditions had so changed that sellers found an opportunity to charge differentials not in accordance with the competitive pattern, replied that one of the minor prerequisites of competition must be maintained even though the major prerequisites were present only in diluted form.[36]

The effect of discrimination upon competition among buyers received serious attention from the courts[37] in 1929, when they interpreted the congressional phrase "in any line of commerce" in the conventional, and apparently obvious, sense to include competition between those engaged in subsequent processes.[38] Manufac-

[31] Eastern States Retail Lumber Dealers Ass'n v. U. S., 234 U. S. 600 (1914). The Association had arranged for the reporting and circulation of the names of wholesalers who sold direct to builders and contractors. This activity was held to be illegal partly because of the element of conspiracy and partly because of its objective.

[32] Mennen Co. v. F. T. C., 288 Fed. 774 (C. C. A. 2d, 1923), *cert. denied*, 262 U. S. 759 (1923).

[33] F. T. C. v. National Biscuit Co., 299 Fed. 733 (C. C. A. 2d, 1924), *cert. denied*, 266 U. S. 613 (1924).

[34] A producer of cereals discriminating against a chain store by refusing to sell to it at its carload rate was held not to have contravened the law. Great Atlantic and Pacific Tea Co. v. Cream of Wheat Co., 227 Fed. 46, 49 (C. C. A. 2d, 1915); F. T. C. v. National Biscuit Co., *supra* note 33. "Effective competition requires that merchants have freedom of action in conducting their own affairs." 299 Fed. at 740.

[35] Rates of profit that in the absence of changes in conditions of demand and supply would induce no change in the amount of resources in any line of activity.

[36] The right of a buyer to choose his sources of merchandise has also been upheld. Raymond Bros. Clark & Co. v. F. T. C., 263 U. S. 533 (1924). An individual wholesaler refused to buy from a seller who sold to chain stores at wholesale prices.

[37] In Mennen Co. v. F. T. C., 288 Fed. 774 (C. C. A. 2d, 1923), *cert. denied*, 262 U. S. 759, the court stated that it saw no evidence that "the public suffered injury or that competitors had reasonable ground for complaint." The court admitted that discrimination by a manufacturer might lessen competition among his customers or potential customers but decided that Congress had not intended to prohibit this kind of restriction upon competition. Its emphasis was upon the absence of any decline in competition between the manufacturer and others in the same line of business.

[38] American Can Co. v. Van Camp Packing Co., George Van Camp and Sons, 278 U. S. 245 (1929). A can manufacturer had sold cans and leased a sealing machine to one customer at 20% below published

turers were then placed in a very difficult position. Pressed by large buyers for special prices they feared suits for restraining competition between the large buyers and their rivals. Where was the line between a justified and an unjustified discrimination?[39] The Robinson-Patman Act was intended in part to clarify the law on this subject. It emphasized however the application of the Act to the restriction of competition in subsequent markets by prohibiting discrimination also where it may "injure" or "destroy" competition with the person who knowingly grants or receives the discriminatory price or with the customers of either.[40] In fact it extended the application of the law. Under the terms of the Clayton Act it had been necessary to show a lessening of competition in an entire line of commerce.[41] This new clause prohibited discrimination resulting only in injury to competition.

The Clayton and Robinson-Patman laws do not prevent discrimination as such. A spark plug manufacturer who sold to an automobile manufacturer at less than cost with the object of creating a demand for replacement purposes which would be met at higher prices was held not to have contravened the law.[42] Presumably the automobile manufacturer and the accessory dealer are not in the same line of commerce and, therefore, the rule in the *Van Camp* case[43] would not affect this decision. The sale of lime at one price to farmers and another to chemical manufacturers would be untouched so long as the price is uniform to all farmers and to all chemical manufacturers. Sales of coal at one price to apartment operators and another to industrial buyers, sales of chemicals at one price to fertilizer manufacturers and others to other buyers, or of milk at one price to distributors of fluid milk and another to cheese manufacturers appear to fall in the same category. These policies do not injure competition in the restricted sense in which it is defined but they are evidence of wide departures from price competition. Such discriminations do not occur in a competitive market. Sellers sell at the highest price offered and are as indifferent to the use to which the product is to be put as they are to the girth measurement of buyers. Furthermore, in so far as the broad principle of competition has been approved because of its effect upon the utilization of resources, serious departures from this utilization occur when the seller finds it possible and profitable to restrict the activities of farmers while encouraging those of chemical manufacturers.

---

prices which were apparently charged to its rivals. The Supreme Court in response to a question propounded by a Circuit Court of Appeals decided that the Clayton Act did apply to discriminations the effect of which was to substantially lessen competition or tend to create a monopoly on the buying side of the market. This reversion to the words of the Clayton Act was reiterated (American Can Co. v. Ladoga Canning Co. 44 F. (2d) 763 (C. C. A. 7th, 1930), *cert. denied*, 282 U. S. 899 (1931)) and a company discriminated against was awarded triple damages. The contention that the discrimination was made in good faith and to meet competition because the manufacturer feared that the buyer would make his own cans was rejected.

[39] These decisions also presented the problem of defining a line of business.

[40] Robinson-Patman Act, §1(a).

[41] This requirement had proved an insuperable obstacle to prosecution in most cases.

[42] S. S. Kresge Co. v. Champion Spark Plug Co., 3 F. (2d) 415 (C. C. A. 6th, 1925).

[43] *Supra* note 38.

B. Policies of Control

1. Differentials between the Prices of Goods of Different Quality.

In the Clayton Act differentials in prices were permitted if they were "on account of differences in the grade, quality or quantity."[44] Whether the Act imposed any limit upon differences in price in these circumstances was never clarified. The Robinson-Patman Act narrows the scope of prohibition upon discrimination because it relates only to sales of goods "of like grade and quality."[45] The significance of this change depends upon the manner in which the courts define grade and quality. The definition is important although far from easy. If differences in brand name justify differences in price special brands may be made for each class of buyer and the manufacturer may combine the production of his own with private brands. But if, as is generally assumed, this basis of differentiation is not allowed[46] there may be a reorganization of production. The production of private brands may be concentrated in firms not selling under their own brand name. Manufacturers with brand names of their own may be compelled to seek forceful methods of increasing the sales of their own brand to make up for the loss of manufacturing business for the owners of private brand names. Large buyers may be impelled to seek purchases of the whole output of some manufacturers; no charges of discrimination can then arise.[47] These manufacturers, if they are in industries where relatively small scale production survives, may be placed in a position of complete dependence upon the single large buyer. Loss of the contract in any year would leave them without any business. Their power to protect themselves against such an eventuality depends very much upon the conditions prevailing in the industry and especially upon the existence of excess capacity.

Rejection of brands as a basis of discrimination may lead to a physical differentiation of products until their differences are sufficient for the courts to accept them as not of like grade and quality. Manufacturing costs may thus be raised. In the chemical industries it may be possible to make products offering similar utility but of different physical constitution. They may sell one to large buyers and another to smaller at price differentials giving considerable benefit to the large buyers. Sellers still have the right to select their own customers in *bona fide* transactions and not in restraint of trade.

2. Differentials between Prices for Different Quantities.

Differences in the cost of selling or transportation justified differences in price under the Clayton Act if they made only "due allowance" for such differences in cost.[48] The Robinson-Patman Act includes in this type of restriction differences in cost due to differences in quantities sold.[49] It permits differentials that make only

[44] Clayton Act, §2.
[45] Robinson-Patman Act, §1(a).
[46] Differences due to the cost of advertising their own brands would appear to be permissible. See p. 314, *infra*.
[47] *Cf.* Hearings before the House Committee on the Judiciary on H. R. 8442, H. R. 4995, H. R. 5062 (Amendment of Clayton Act) 74th Cong., 1st Sess. (1935), p. 19.
[48] Clayton Act, §2.
[49] Robinson-Patman Act, §1(a).

due allowance for differences in the cost of manufacture sale or delivery resulting from the differing methods or quantities[50] by which such commodities are sold or delivered. The most notable aspect of this provision is that it apparently permits a manufacturer to refuse discounts equal to differences in cost arising out of differences in quantity sold or methods of sale.[51] If, as is likely, the Act is so interpreted it cannot be defended as a means of achieving in the sale of manufactured goods the results of competition. Sellers may discriminate in favor of but not against the firms with whom dealing is more costly. Such a policy cannot be defended on the ground that the law is being modified merely to remove the unfair advantages of large firms.

This same of policy permitting discrimination against large buyers appears to be implied in the provision in the Robinson-Patman Act permitting government control of price differentials.[51a] The introduction of direct control is itself notable as representing a shift toward direct control of price policy. Where the Federal Trade Commission finds that "available purchasers in greater quantities" of particular commodities or classes of commodities "are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly[52] in any line of commerce" the Commission may "after due investigation and hearing of all interested parties, fix and establish quantity limits and revise the same as it finds necessary." But under what circumstances would differentials making "due allowance" for differences in quantity purchased be unjustly discriminatory? If the differentials do not exceed the differences in cost referred to above why interfere merely because only a few firms can qualify for them? The second ruling phrase is "promotive of monopoly." Here again the legislature was face to face with the inconvenient tendency of an individualism that encourages the survival of the fittest to destroy, by that very fact, the mechanism for the future selection of the fittest. In giving to the Commission power to fix maximum discounts under these conditions an attempt is made to limit the size of firms in the distributing industry so as to prevent the emergence of monopoly, however that may be defined. The power is given apparently in defiance of the possibility that the large firm is increasing in size because of its superior efficiency. Congress seeks to modify the dictum of the Supreme Court that "the law does not make mere size an offense"[53] by adding "except in the field of distribution." Regulation of the size of firms by way of the regulation of the prices they pay for their materials can, of course, be a far more powerful means of control in the field of distribution than in the field of manufacturing. What size

[50] Sellers customarily classify their buyers into a few groups for the purpose of calculating discounts. Even where they are classified according to the size of orders there is some discrimination. It is doubtful, however, whether the courts will insist on separate prices for orders of each size.

[51] Hearings, *supra* note 47, p. 10.

[51a] Robinson-Patman Act, §1(a).

[52] The standard, "unjustly discriminatory or promotive of monopoly," may be held to be so lacking in precision and definiteness as to render the provision an unconstitutional delegation of legislative power if the Court continues to utilize the principle—apparently discovered in the "hot oil" case (Panama Refining Co. v. Ryan, 293 U. S. 388 (1935)).

[53] U. S. v. U. S. Steel Corp., 251 U. S. 417, 451 (1920).

of firm will be the maximum permissible? When the Supreme Court has sought to restore competition by partitioning large firms held to be in breach of the law it has substituted in some cases three or four firms. Will the Commission be guided in the administration of this uncomfortable power by the precedent set by the Court, and how much protection will the consumer thereby secure? Can sellers whose opportunities for increasing their relative volume of business are cut off by Congress be regarded as vigorously competing with each other to the benefit of the buyer?

3. Differentials due to Differences in the Cost of Selling.

The allowance of price differentials to cover differences in the cost of selling will presumably recognize advertising costs as a justification for differentials. Neither the Congress nor the courts have taken action to curtail expenditure upon advertising although, as is explained above, such expenditures are in large part a substitute for price competition as a way of obtaining business. They seriously interfere with competition in the market and tend to raise costs.

4. Differentials "to Meet Competition."

Discrimination in good faith and to meet competition was permitted in the Clayton Act[54] and the Robinson-Patman Act makes little change in this respect.[55] This provision implies the possibility that discrimination may occur in defiance of the law and permits others to follow suit if some seller has started it. This attitude may be realistic but it creates difficulties. May a seller discriminate when he honestly believes he is responding to a similar policy on the part of a rival? Moreover the patterns of discrimination existing on the day the law came into force can all be defended by individual sellers under this clause. So long as these price differentials are unchanged they may be beyond the reach of the law.[56] If a seller supplies superior facilities rivals may respond with a lower price.[57] It would appear to be necessary, therefore, to determine how much difference between the prices of competitors may be justified by any difference of facilities.

5. Discrimination and Changes in Price.

The Robinson-Patman Act introduces a new provision that the Act shall not prevent price changes from time to time in response to "changing conditions affecting the market for, or the marketability of, the goods concerned."[58] Sellers faced with the deterioration of goods, obsolescence of seasonal goods, or those discontinuing business may make price reductions without breach of the law. Congress was

[54] Clayton Act, §2.

[55] The Act, §1(b), provides that any seller may rebut a *prima facie* case of illegal discrimination by showing that "his lower price or the furnishing of facilities or services to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor or the services or facilities furnished by a competitor."

[56] The Act may have the effect of permitting differentials in excess of cost differentials. If one firm can show cost differentials justifying certain discounts others may apparently grant the discounts without being able to achieve the economies on which they are based.

[57] *Cf.* Answer to Complaint, In Matter of Shefford Cheese Co., F. T. C. Docket 2936. The Company defended part of its discounts on the ground that it did not deliver at the store door while its rivals did.

[58] Robinson-Patman Act, §1(a).

probably fearful that prices might be reduced for a short time to accept a large order and subsequently raised again. But if prices charged at different times are to be compared serious problems are likely to occur. How long a period of time is to be taken? Ultimately this question leads to the necessity of deciding what "changing conditions affecting the market" justify a price change and how large a change they justify.[59] At this point apparently the policy has been transformed into one of price control.

6. Differentials in Services or Allowances.

The Robinson-Patman Act seeks to deal with some of the possible discriminations in matters other than price but having similar effects. It was alleged that large distributors had benefitted from advertising and brokerage allowances.[60] The large distributors explained that it would be uneconomical to make them purchase through brokers whose services they did not need, and whose charges would be added to their costs.[61] Such a policy would merely protect antiquated methods of distribution. Brokerage payments of this kind were, nevertheless, prohibited.[62] This clause, however, merely prevents large buyers from obtaining part of the economies of their size in the form of fictional brokerage payments. They must seek them all in the form of price differences which must meet the requirements already laid down.

Advertising allowances were defended by the large sellers as a modern method of promoting sales.[63] One large chain was reported to have received advertising allowances from one manufacturer amounting to eight million dollars in one year, of which six million dollars are said to have been spent by the buyer on advertising.[64] Allowances had also been made for window dressing although they had not necessarily been so applied.[65] The Act does not forbid such allowances or limit them to the cost of advertising service rendered by buyers; it merely requires that they shall be made upon a "proportionally equal" basis to all buyers.[66] It gives no indication of the basis of calculating proportionality.[67]

[59] *Cf.* Answer to Complaint, In Matter of Bird & Son, Inc. and Montgomery Ward & Co., F. T. C. Docket 2937. Montgomery Ward denied knowledge whether the seller's price changes had been made in good faith in response to changing conditions in the market.

[60] Hearings, *supra* note 47, pp. 6, 69, 96, 183.

[61] *Id.* at pp. 148, 184.

[62] The Act, §1(c), makes it illegal to grant or accept anything of value as a commission, brokerage or allowance except for services rendered in connection with the sale or purchase. Brokerage payments may not be made to intermediaries unless they are under the control of the person paying the commission.

[63] Hearings, *supra* note 47, at pp. 149, 177. See also charges of payments of advertising allowances by razor blade manufacturers contended by the Federal Trade Commission to be in violation of §2 of the Clayton Act. *N. Y. Times*, April 21, 1936, p. 47.

[64] Hearings, *supra* note 47, at p. 61.

[65] *Id.* at p. 82. It has been stated that in 1935 department, dry goods and specialty stores spent $212,000,000 for general publicity, of which $136,000,000 was spent for newspaper publicity. Manufacturers are said to have contributed about $5,000,000 towards the cost of this publicity. *N. Y. Times*, Aug. 16, 1936, §3, p. 8.

[66] The Act, §1(d), forbids payments by a seller for the benefit of a customer as compensation for facilities or services furnished by the customer in connection with the processing, handling or sale unless such a consideration is made available "on proportionately equal terms to all other customers competing in the distribution of such products."

[67] Some distributors, after temporarily abandoning advertising allowances, are reported again to have

C. The Effects of Control

1. Upon the Organization of Distribution.

The effect of the Robinson-Patman Act upon the struggle between the competing types of distributor depends partly upon the policy of the Federal Trade Commission in fixing maximum discounts and the attitude of the courts to its policy. Upon this subject there is little to say. So far as discounts *may* be allowed up to the differences in the cost of dealing with different types of distributors the pressures will probably be similar to those affecting resale price maintenance and there will be a tendency for manufacturers to favor the small distributors, subject, however, to important checks already mentioned. So far as large distributors secure the full benefits of the economies of their method of distributing their discounts will depend upon the amount of the economies involved. In the first place, there will be general pressure upon manufacturers to calculate costs in order to have evidence on this subject. This pressure will reveal the arbitrariness of many conventional allocations of costs. It is not inconceivable that it will be found in some cases that the large buyers have been "carrying" the smaller, *i.e.*, that larger discounts could be given to the larger firms without contravening the law. Discounts based upon the contention that a single large order raises the rate of operation of plant more than a small order appear to have been regarded in Congress[68] as undesirable. In so far as the loss of a large order necessitates obtaining a number of small orders in order to maintain the rate of operation, and the cost of obtaining these small orders may be higher than that of obtaining the large order, differences in price would be justified by differences in the cost of selling. But, as a number of small orders can raise the rate of operation as effectively as a large one of an amount equal to the aggregate of the small orders, the manufacturing costs in the one case are the same as in the other. Neither the large nor the small orders can legitimately be singled out to bear the burden of the initial costs of running the plant at all.

Large orders for future delivery may well justify lower prices. If they permit production during "off peak" periods they may enable a plant to maintain an average rate of operation over a period of time higher than would otherwise be possible. The total amount of resources necessary to produce a given total output is less when the plant is operated regularly than when it is operated irregularly[69]

demanded them but to have required in their purchase contracts an avowal that the manufacturer is prepared to make similar arrangements with other purchasers similarly situated and on proportionately equal terms. While the buyer, as well as the seller, is responsible for any breach of this clause the buyer can know whether breach has been committed only if he knows the prices charged by the sellers to all his rivals and also the meaning of the phrase "proportionally equal." The avowal demanded of the seller is sought as a means of defense in this difficult situation. *N. Y. Times*, Aug. 27, 1936, p. 37. The position of advertising allowances made in an entirely separate contract is dubious.

[68] Hearings, *supra* note 47, p. 10.

[69] The Federal Trade Commission complained that the Goodyear Tire and Rubber Company had discriminated in favor of a large mail order house in contravention of the Clayton Act. The contract with the mail order house provided for a large minimum annual purchase of tires over a period of years. These tires were sold by the mail order house under its own brand names. Those sold to dealers were sold under the manufacturer's brand which he advertised. Until wide publicity was given by the Federal

yet the resulting economies fall to those able to give large orders and the large distributors may continue to obtain better prices than do smaller buyers.[70] The social advantages of this method of organizing production are undeniable although its consequences in terms of the survival of a small number of large distributors may be disliked. Discounts based merely upon the total amount of purchases during a given period would, however, be difficult to justify. If the large buyer purchases upon a hand-to-mouth basis his demands may be as spasmodic as those of small buyers and occur at the same time.

2. Effects upon the Price Policies of Manufacturers.

The policy of controlling discrimination may affect the general level of prices charged by manufacturers. The law appears to hamper if not abolish secret price cutting. A sale to one buyer at less than the "regular" price could be argued to injure the competition between rivals who paid the regular price and the buyer at the cut price. Such price cutting may not be defensible in terms of differences in the cost of manufacture or delivery. It does not necessarily favor the largest buyers. Where manufacturers are relatively few, and overhead costs an important part of total costs, there is constantly anxiety to prevent secret price cutting. Secret price cutting by one seller causes rivals to lose business and they resort to similar price cuts. The market becomes "chaotic" in the sense that there is no uniformity of prices and a price war is likely. On the other hand, a manufacturer carrying overhead costs is often tempted to obtain business by making a secret concession from his regular price. An open reduction involves a loss of revenue upon all his other business and this loss may exceed the beneficial effect of the additional business, allowance being made for the out-of-pocket costs of executing the order. But if the concession is made upon one or a few orders the gain may exceed the out-of-pocket cost of the business. There is no economy in a policy of throwing industry into price wars and little possibility of doing so. But the importance of secret price cuts lies in their tendency to operate as an entering wedge for open price reductions.

Trade Commission, the majority ot purchasers were doubtless unaware of the origin of the tires of the mail order house. The Commission ordered the discontinuance of discrimination "by selling at net realized prices which are lower than the net realized prices at which it sells tires of comparable grade and quality to retail dealers and other customers." Matter of Goodyear Tire and Rubber Co., F. T. C. Docket 2116 (1936). The Commission claimed that the discrimination made more than due allowance for the cost of selling or transportation and was not made on account of differences in grade quality or quantity sold. It emphasized that the discrimination had been kept secret from other purchasers from the manufacturer, thus suggesting doubt as to whether they represented only the economies resulting from the scale of the purchase. Competition had been substantially restrained between the mail order houses and other distributors of tires, and the contract tended to create a monopoly in the distribution of tires. In its order, however, it ignored differences in the cost of manufacturing or of selling as well as differences in quantity as justifying price differentials. The Company announced the abrogation of the contract on account of the passage of the Robinson-Patman Act. It also announced that it would appeal from the decision of the Commission concerning its operations prior to the change in law, *N. Y. Times*, July 17, 1936, p. 30.

[70] Chains often buy farther ahead than do small buyers. Hearings, *supra* note 47, pp. 23, 24. As large buyers buy for longer future delivery than the small the price charged on the day of the contract for immediate delivery to small buyers may be more than that for future delivery for large buyers. Similarly the price on the day of delivery may differ between the two classes.

In imperfectly competitive markets they indicate an imperfect foresight of sellers which supplies a downward pressure on prices. If secret price cutting is eliminated sellers act upon the assumption that any reduction in price made by them will be immediately met by all rivals. They think in terms of the total demand at each price, *i.e.*, as a monopolist, although possibly limited by the fear of new competition resulting either in a cutting of prices or a wider sharing of the market at existing prices. The sellers draw the line between a desirable and an undesirable price cut but their standards of desirability frequently depart from the general social interest. The elimination of secret price cutting, therefore, increases the imperfection of competition.

Downward pressures upon prices are also reduced by attempts to obstruct large buyers who are said to beat down the prices of manufacturers without mercy. Mercy of course found no place in the freely competitive market. How low can prices be forced? It may be said that the large order is a great temptation to the seller. Why? If it is because it saves the cost of obtaining a large number of small orders the Act does not remove the temptation. But a manufacturer may accept a low price because he has become dependent upon the large buyer; he may have allowed his selling organization to shrink and have relied upon continued orders from the large firm. Turning to small orders means incurring the initial costs of entering an alternative market. But this situation may even be encouraged under the law because a manufacturer selling his whole output to a single buyer is immune from the Act. The large buyer may obtain low prices because of the low rate at which capacity is being operated in the manufacturing industry. Any price above the out-of-pocket costs of new business yields a contribution towards overhead costs. The prospect of a large block of business promises a large aggregate contribution, although the contribution per unit of output may be low. In the absence of pressure from large buyers manufacturers in many industries where overhead costs are important have shown a preference for meeting a decline in demand by maintaining prices and allowing output to fall. The quantitative amount of the fall in output due to the maintenance of prices varies of course from industry to industry and with the period of time in view. In so far as plants not used become obsolescent, rust out, involve costs for maintenance or increased interest charges, additional costs are imposed on the industry and upon society without corresponding benefit. The large buyer may, therefore, be a means of overpowering the sellers and preventing them from pursuing this policy. At the present stage in the evolution of distribution and prior to the passage of the Robinson-Patman Act there was probably vigorous enough rivalry between distributors to ensure that the benefits of these downward pressures upon prices were passed on to ultimate purchasers. There looms in the future, however, the possibility that distributors may become so large and so few that the pressure to pass on these benefits may be seriously modified.

These problems are particularly acute in times of depression. Freedom to large

distributors to press down manufacturers as far as they are able may cause the elimination of firms. Productive resources which society would have been well advised to keep in use in order to meet a later increase in general demand may be abandoned. Their abandonment necessitates the investment of new capital when the upturn of business comes, possibly stimulating the upswing of general business activity. This situation is extremely complex and the analysis necessary to provide a basis for a proper policy is not available. In the first place the pressing down of prices, if general, may restrict the depth of the downward swing in industrial activity and indirectly reduce the prospect of the elimination of firms. In the second place, the failure of firms does not always involve the abandonment of plant. It may continue in production with a lower capitalization. In the third place it is always difficult to determine the amount of investment that should be retained in an industry to meet the upturn of business. The amount and time of the upturn are always uncertain. The obstruction of the development of large distributors and the elimination of secret price cutting is likely, however, to have the general effect of strengthening manufacturers in their efforts to maintain prices, thus reducing output and possibly intensifying depression.

V. Conclusion

It is abundantly evident that the policy of maintaining the prerequisites of competition, either in the narrow theoretical sense or even in a somewhat broader interpretation, has failed to attain its objective. If mere unfairness in the policies of the large firms[71] is the explanation of the decline of price competition, the modifications that have been introduced into the law by the anti-trust laws have until now failed to maintain competitive markets in many industries. The more plausible explanation of the increasing imperfection of competition is that it is due to changes in the techniques of production and selling. In some of the branches of heavy industry the economies of large scale production, coupled with the fact that markets are narrower than the national boundaries are sufficient to explain the imperfections of competition.

In choosing whether to maintain the number of firms at a competitive level or to accept the economies of size and with them a decreasing number of firms, the courts have in general chosen the latter alternative. In the sale of consumers goods the other major change accounting for the size of firms lies in the development of methods of sales promotion. Neither the courts nor Congress have adequately recognized the tendency of this development to damage the market by dividing it into a series of sub-markets for specially branded products. Even when contemplating the policies of sellers powerful enough to seek to maintain resale prices, and

[71] The pursuit of profit is sometimes the basis of criticism of large firms, although such conduct is of the essence of capitalism. An important aspect of price policy in the steel industry has been condemned as "a network of actions by individuals and groups motivated by the desire for larger profits and acting without regard for the interests of other industries or the consuming public." Fetter, *Planning for Totalitarian Monopoly* (1937) 45 J. Pol. Econ. 102.

thereby restrict price competition in later markets, or to set discounts favoring one class of distributor rather than another, the courts failed to be impressed by the extent to which such sellers have been emancipated from competitive pressures. The courts have looked back to the picture of a competitive world and refused to interfere because the seller must have power to select his customers, or even for more formal reasons. In its recent legislation Congress appears to endorse price differentials allowing the seller to seek to recover the cost of advertising his goods. To do otherwise would undoubtedly cause serious dislocation of business but to proceed thus is not to maintain the prerequisites of competition. States have enacted resale price maintenance legislation which will have similar effects.

In the threefold struggle that has developed between the sellers of advertised goods, the small scale distributors and the large scale distributors, federal and state governments have been under pressure to obstruct the development of large distributors. Those threatened with ejection from their positions in the market and in part also manufacturers seeking to maintain powerful positions by advertising, have exerted great pressure. They have not sought to eliminate only the unfair advantages of large distributors. Taxes against chain stores are an obstacle to one kind of large scale distribution arbitrary in amount. Progressive taxes on gross sales also hamper large firms. The bias against large distributors in the Robinson-Patman Act has already been mentioned. Thus, although anti-trust laws have failed to maintain the numbers of manufacturers there appears now to be an effort to restrict concentration in distribution, a process of relatively recent occurrence. But in the process of doing so not only is the pursuit of the economies of large scale distribution hindered. Price competition between manufacturers is softened and they exercise control over the reorganization of distribution.

The type of case coming before the courts and the situations with which Congress endeavors to deal all suggest how far competition has receded in a number of markets. Efforts to rearrange the scenery so that competition could commence and continue would involve far reaching changes likely to induce drastic opposition from business and the courts and to offer the ultimate purchaser little if any benefit. In fact the control of price differentials is a step in the direction of a policy of seeking the ends of competition by social control. This policy leads on toward increasing state control. Maintaining the number of distributors beyond the economical number does not give the buyer the benefits of competition. The difficulties and dangers of control of prices are difficult to exaggerate. There may be ways of permitting a wide decentralization of economic initiative and yet securing the orientation of the economic system toward reasonably acceptable social objectives and its reasonably efficient operation. Unless such policies are speedily discovered we face the mountainous problems of price control.

COST AS A STANDARD FOR PRICE

Walton H. Hamilton*

I

An act of Congress is an invocation of the judiciary. It is alike an appeal to the courts to subdue a new process to law and order and a body of general directions which are to be hammered into standards and rules. It takes years, a procession of cases from out of life, and a succession of judgments to assimilate a statute within the august corpus of the law.

The time was when a bargain was a bargain, and that was legally the end of the matter. The ordinary course of buying and selling, if untainted by fraud and untouched by collusion, was a private affair and no fit subject for judicial inquiry. But a growing complexity in the marketing process has made private bargains a matter of concern to the mercantile community. The older line of manufacturer to wholesaler to retailer has been twisted into an intricate diagram. The manufacturer may sell through his own retail outlets; the retailer may take over the work of wholesaler or even of manufacturer; in a trend towards celerity of movement functions may become confused. In the marketing struggle between types of organization the chains and mail-order houses have prospered and the wholesaler and independent store have declined.

It is not easy to garner all that is responsible for mercantile change into a concept called cause. The chain, the mail-order house, the department store have made the first serious attack upon the wastes and inefficiencies of distribution. A careful analysis has enabled them to eliminate unnecessary steps in the marketing process; and their purchases in large quantities have reduced costs. But they have also been able to turn their bargaining power to account and to extract from manufacturers exceptional terms which they could not afford to extend to other mercantile buyers. To the extent that lower costs are the result of efficiency, they are hardly open to attack. To the extent that they rest upon "price discriminations" which have no

* B.A., 1907, University of Texas; Ph.D., 1913, University of Michigan; M.A.(hon.), 1928, Yale University. Professor of Law, Yale University School of Law, since 1928. Director of the Bureau of Research and Statistics, Social Security Board, since 1936. Member, National Recovery Administration, 1934-1935. Author of *Current Economic Problems* (1915, 1925); *The Control of Wages* (with S. May) (1923); *The Case of Bituminous Coal* (with H. R. Wright) (1925); *A Way of Order for Bituminous Coal* (with H. R. Wright) (1928); *The Power to Govern* (with D. Adair) (1937). Contributor to legal and economic periodicals.

This article is a section of the summary of a book on prices containing analyses of the structure of selected industries to be published this fall.

basis among the expenses of production, they are open to attack. The avowed purpose of the Robinson-Patman Act is to bring the prices charged distributors into accord with standards of mercantile justice. Its intent is to bring the marketing process within the law, to "do right" between merchant buyers, and to establish within commerce an equivalent of "the equal protection of the law."

An action under Section 2—the heart of the Act—would take some such course as this. The Federal Trade Commission would, after investigation, find that a manufacturer had sold to distributors a ware of trade at different prices and that the effect was substantially to lessen competition or to enhance the competitive position of the favored buyer. A cease and desist order would be issued against the manufacturer and his favored customer. The suit would go to court, and the burden of justifying "discrimination" would fall upon the parties to the bargain. In such a cause at law a large number of lines of defense are open, along one or more of which the alleged lawbreakers may stand and do battle. The techniques of corporation finance may be used to stay—if not to arrest—the attack of the government. A dummy corporation, for instance, may be established to take care of sales and may be fitted out with all the outward trappings of genuine corporate personality. If sales to the favored shipper and to the marketing corporation are at the same price, the company does nothing with which it may be charged and if there are price differences further down the line they are between different sellers. Of it may be plead that the wares which are subject to different prices are not identical. A tire manufactured for Sears-Roebuck is not a Goodyear; a tooth-paste blessed with the term Iodent has an indefinable something which a mere combination of chemical elements could never possess; a Del Monte can of peaches called by some other name would not be the same. In chemical and physical process there lie myriads of subtle distinctions which can be drawn upon to make plausible the argument for the defendants.

There is no call here to question the ingenuity of corporation lawyer, industrial engineer, or master of many another mystery which may be called upon to explain that in the realm of merchandise the differences in question belong rather to appearance than to reality. But it is not unlikely that in the front of the fray will be found cost accountants employing their skills to show that things are seldom what they seem. The government will demonstrate that a manufacturing concern has given to a customer a price differential not adequately to be accounted for by considerations of quantity. The defendant will argue through its accountants that the difference is easily traceable to differences in the expenses of production. In rebuttal the government will present its own accredited corps of accountants; and the issue of pecuniary apology—with all its complex exhibits—will go to jury and judge only to be fought all over again in appeal court. As case after case, in the style of F. T. C. v. Persona I, II, III . . . come on, cost accounting will present an important battle line and its techniques will be enlisted in the rival services of the protagonists.

The Robinson-Patman Act is the law of the land. Trial is to proceed by the ordeal of cost accountancy.

II

As the apostle would put it, accountancy is all things to all men. It is at once a picture, a scheme of notation, a language, a technique, a ritual, an instrument, and a social institution.

Accountancy is a creature of business. It was business which called it into being, determined its character, and shaped its technique. At first it involved little more than setting down the simple figures involved in the day's work and letting addition and subtraction do the rest. But as the volume of transactions increased, as the capital account grew in importance, and as multiple products came to be handled, the scheme of accounts had to reflect the growing complexity in the business organization. So rules of thumb had to be hit on for charging off depreciation, apportioning expenses among products, and resolving solvency into the financial standing of departments.

Its purpose determines the character of a system of accounts. Its technique transmutes all that it touches into magnitudes which can be stated with precision. But the use of quantitative symbols does not imply pecuniary verity, and the appearance of certitude must not be taken for certainty. Since its end is to help fallible human judgment to a bit more of soundness, a scheme of accounts must depend upon the kind of judgments to be made. A system adapted to the needs of the cotton planter will not serve the purposes of the steel corporation. A university which disburses returns from large investments, demands an accountancy quite different from the speculative enterprise in silver mining. In the oil industry accountancy must serve to shape a strategy where objectives are the maintenance of outlets and the advancement of competitive frontiers. In railroads the multitude of facts relative to the carriage of traffic must be presented in a form which invites an effective public control.

It is, in short, a feat of the mind to crowd the activities of life into a colorless pecuniary statement. In a simple agrarian society, where the family-on-the-farm is an almost self-contained entity, there is scant place for a formal economic calculus. The household, little touched by the market, produces its own living; the round of daily activity and the seasonal care of crops is customary; a rough justice assigns traditional tasks to members of the family and disburses the rewards of industry among them. A pecuniary calculus is not needed to guide activities; it sits awkwardly upon the moneyless affairs of the household; and the series of judgments which keep the microcosm going has little place for the precisions of accountancy.

As the ways of business permeate a changing agriculture, the devices of pecuniary calculation are not easily assimilated. The categories, without which accountancy is powerless to proceed, are rather alien to the man of the soil. The difference between overhead costs and out-of-pocket expenses has little meaning to him. To distinguish

interest upon invested capital and profits from an adventurous enterprise is to transcend the bounds of his thought. His naked acres, his improvements, and the labor he has bestowed upon them are an organic whole; to attempt to isolate the contribution of each and set it down as a separate cost is an unreal intellectual exercise. The farmer who enters in his books interest on his investment, writes off depreciation upon barns and live-stock, allows himself a salary as farm executive, and succumbs to all the indulgences of an intricate costing system is destined to view his new-fangled records with amazement and to become a discontented mortal. The introduction of a full-fledged accountancy from an alien culture is almost certain to bring into a going agricultural community a plague of bankruptcies.

So too with other occupations and industries. Their activities lend themselves graciously or stubbornly to such an intellectual creation as accounting. The wage-earner does his best to maintain a favorable balance between earnings and expenditures. But he scribbles down no capital sum to represent the cost of his upbringing and training; he writes off no depreciation against the wear and tear which attends employment; he collects no profits upon the sale of his own labor. The salaried man usually records his financial way of life in no more intricate calculation than a series of check-book stubs and a bank statement. Even the physician, lawyer, or consulting engineer, who must be his own executive, usually does not take the bother, or cannot rise to the task, of separating occupational from personal activity and reducing it to the trim lines of pecuniary expression. The doctor, for example, uses the same automobile—quite undistributed in his accounts—to call upon his patients and to take his family out riding; and the professor never sets down his unusual opportunity to use the university library as an item of individual income. In the whole domain of personal life and professional calling, the discipline of accountancy still sits lightly.

Even in the realm of business its dominion is partial and its rule insecure. In an enterprise in lusty competition with others of its kind, survival is the thing and the system of accounts has its focus in solvency. Each successive balance-sheet presents the crisis, and the exigencies of the moment are of far greater importance than the prospects and perils of the less immediate future. Accordingly depreciation, obsolescence, and other factors which carry no immediate threat are matters of lesser concern and the capital account is likely to be regarded as a secondary phenomenon. Necessity crowds into the pecuniary foreground the assets and liabilities which bear upon immediate solvency. But in an enterprise, such as a public utility, where continued survival seems assured, solvency is likely to be taken for granted. Economic security makes possible a longtime policy; and the conservation of the investment and the enlargement of dividends become desiderata of importance. So here the recitation of pecuniary incident is addressed consciously and minutely to the facts of depreciation and obsolescence. A persistent and ingenious attention is likely to be directed not so much to securing the upkeep of the physical property as to

making it certain that capitalization fails in not one whit to give full recognition to every item that should go into the account.

In all industry under the guidance of business, the motive of pecuniary gain sets the theme for the accountant's song. The wear and tear of human labor, sickness and industrial accident, irregular employment, and other human costs of keeping industry going may be matters of grave consequence to the community and in the aggregate impose a charge of gigantic magnitude upon industry. Yet in a scheme of account designed to serve business, they can obtrude only as they become pecuniary costs in individual enterprises. Accountancy is far from being a pecuniary expression of all that is industrial reality. It is an instrument, highly selective in its application, in the service of the institution of money-making.

III

And like a philosophy, the august corpus of the law, or the seemingly exact verity called mathematics, accountancy is a creature of the human mind. It is an expression of the ways of thought of the age, the mercantile habitat, and the body of business opinion within which it has come to maturity.

In a society which has just begun to be money-conscious, a Roumanian peasant yields just enough to pecuniary allurement to sell his cow for a handful of silver. But the deed done, the coins lack the symbolic importance which a familiar culture alone can give, and he runs pathetically after the buyer in a vain attempt to rue the bargain. Presently such an attitude would become impossible; for to his children the coins will betoken the wherewithal of activity and enjoyment presented by an industrial society.

As a culture became more complex, the mind of man demanded a simple device by which he might adjust his activities to its multifarious realities. The division of labor, the rise of the market, the emergence of an industrial system, the growing dependence of men upon each other for their livings demanded the easy and expeditious exchange of commodities. Even if horses cannot be added to apples, a man's labor has to be exchanged for the necessities and frivolities of life; and, whatever its intellectual difficulties, some practical way had to be discovered for insuring an equivalence of values in the process of buying and selling. Accordingly there appeared an insistent need for a pecuniary unit whereby unlike things might be compared and judgments made respecting them.

So the incommensurable put on commensurability and the adamant mind of man was disciplined to the exigencies of a pecuniary method of calculation. It was no eternal mold for pecuniary verities handed down from on high. It was—like logic, or algebra, or the device of analogy in the law—an ingenious contrivance of the human mind to serve a limited and practical purpose. But as it took its place among the habits which make up a culture it came to be looked upon as obvious in its being and its procedures.

Its hypothetical character is to be discovered only by analysis. A simple choice between values requires a judgment; a creative feat of mind converted the primitive act of comparison into the technique of calculation. We see and hear and feel with our senses. The optical nerve, whether the stimulus be light or sound or weight, makes its response only in terms of sight; the auditory nerve, whatever the stimulus, responds only in terms of hearing. Change the physiology of any sensory organ and the sensations which come from without would be different. In like manner different persons perceive the phenomena of society and arrange them to their ideas and uses.

In a consideration of objects of nature some violence is done to reality by the use of such general words as leaf or tree or forest. The phenomena of human behavior are too varied and too interwoven to fall easily into obvious groups; we can garner them into classes only by the use of names which are inventions of the human mind. And abstract words—such as demand, tort, property, and account—are more often than not the most generic of names, each a permutation of particulars that may be variously put together. For all the appearance of certainty, such abstractions vary from discipline to discipline and from age to age.

When phenomena are confined under appropriate symbols, their use demands a structural discipline. A simple calculation, a complicated argument, a vital discussion teems with far more reality than can be crowded into the articulate premises of a syllogism. It is one of the most refined products of an intellectual system. Its color and vitality runs far back into the past; and its meaning is inseparable from the culture to which it belongs. To this inevitably hypothetical process of subduing fact to human purpose, the term "the philosophy of 'as if'" has been given—itself as much a work of art as the thing it professes to describe. Every discipline of the human mind, which professes to reduce a domain of life to order, is established upon its own philosophy of "as if."

In theology a few indisputable postulates are set down as simple matters of faith—even though devout zeal too often endows sacred truths with secular proof. The most elaborate of theological creeds are by a distinctive process of mind called deduction derived therefrom. In law an hypothesis of "the reasonable man" supplies a standard of conduct; a set of presumptions, which often enough are quite at violence with fact, reduces a complicated situation to such simplicity of issue as to invite decision; and the fiction "the opinion of the court" enables a bench of judges to speak as if they were of one mind. In economics a small number of postulates, which impose upon industrial activity an analogue to the mechanics of physics, enables explanation to get off to an axiomatic start. In history a series of assumptions—rather unconsciously made—imposes upon a disorderly course of human events a sequence, a trimness and a purpose which the annals of mankind in the raw do not possess. To call such concepts, postulates, and procedures hypothetical is to reveal their character—not to condemn them. They are grounded upon such approximations to reality as the human understanding in its cultural setting can attain.

They meet the pragmatic test of beating the mass of relevant reality into a form for human use. And, without the benefit of his fictions, the mind of man could not carry on.

In spite of an outward show of exactness, the discipline of accountancy is established upon a philosophy of "as if." The assumption that the activities of a business can be captured in the symbolic language of the pecuniary calculus and exhibited in the balance-sheet is a conventional—and reasonable—act of faith. The cleancut categories which divide a realm of accounts into so many separate provinces, represent the accountant's feverish attempt to bring a sprawling domain of unsubdued fact within his understanding. The ordinary device of profit-and-loss lies at the heart of the scheme of accounts and gives reasonableness to the whole procedure. The capital account is a device intended to picture private investment and to give to a historical occurrence a current reality. The concept of overhead cost—an "as if" without which the affairs of private enterprise would be hopelessly muddled—did not appear as a bit of quantitative verity. It took some decades of confused calculation before accountancy contrived so neat a trick. The exigencies incident to carrying on industrial enterprise create problems; the man-trained-to-calculate, within the limits of the prevailing ideology, attempts their solution; and a scheme of accounts emerges as a necessary and imperfect instrument for converting industrial activity into quantitative knowledge.

As with concepts, so it is with the processes of accountancy. The calculations run in terms of a conventional monetary measure such as a dollar or a pound; its records are never established upon an abstract unit of purchasing power. The keeping of books is an endless affair which must be broken into arbitrary periods. The year which coincides with the astronomical unit of the cycle of the earth around the sun was useful enough in agriculture; but when borrowed for industrial use, it cuts up a continuous stream of transactions. The procedure of double-entry bookkeeping provides a useful, but crude, check upon recorded figures. A balance-sheet is the most conventional of financial statements; it crowds a miscellany of items into a few trim lines. Its reason for being is the demand of stockholders for so much of a knowledge of a business as may be crowded upon a single page. The thing called depreciation is a physical fact; but under a business economy sheer wasting away has to be converted into the language of a pecuniary asset. The accumulation of a reserve rests upon an intellectual process compounded of such elements as hope, policy, hazard and entry. Its nominal or substantial fatness may be represented by cash-on-hand, securities of an uncertain value, or a mere pecuniary figure of mighty sound. The figure called "valuation" represents an intricate process of thought which runs back of business judgments, through legislative acts and judicial decisions to the common-sense notions of a people as to what is fair and just. The figures have precision; yet they present many a fragment of disguised law and camouflaged philosophy.

IV

The rationale for a set of costs lies in a matrix of social custom, personal habit and adaptation to the economic necessities of the moment. As these factors change, costs fluctuate; the costs that at any moment go into the manufacture of a product reflect the temporary alliance into which they have entered. But social custom moves only irregularly; business conditions shift spasmodically; and for some unknown reason men do not change their habits of thought in rhythmic unison. Consequently, a scheme of costs never quite wins the complete acceptance of the industry, is only partly rational and represents only the most partial accommodation to the industrial efficiency of which a society is capable. It is pertinent, therefore, briefly to inquire into a few of the forces that shape costs and to draw the results into a fragmentary picture.

Some services—matured in an older culture—have made only a halting accommodation to the modern world. A striking instance is tobacco production. Under the AAA the manufacturers insisted that they were paying more for the leaf than they needed to secure their supply. But this did not mean that the producer was "recovering his costs." The economic plight of the average tobacco producer is such as to make any concept of cost recovery inconceivable. He is simply an instrument for the production of tobacco; he plants his crops regardless of market or price; the fluctuation in return merely mitigates or increases those discomforts which constitute for him subsistence.

But the classic illustration is sugar. The Tariff Commission undertook an inquiry into the cost of production in Cuba. The island economy has assimilated rather imperfectly the thought-ways and devices of business. In the minds of the planters items-of-expense are not clearly distinguished, and the accounts which are kept would never receive the imprimatur of a C.P.A. What the cane grower receives is the only realistic approximation of the cost of production of the Tariff Act. So it was discovered that unit cost per pound was the New York price minus transportation minus tariff; it was, graciously enough, exactly equal to the difference in cost of production at home and abroad. Moreover, if the duty was raised or lowered, the incidence of change would be reflected in planter's cost.

Even where modern business ways are established, the going is difficult. The vast majority of goods produced are joint products. The industry—in ascertaining the cost of its individual products—is faced with the impossibility of separating non-separable products. No accountant has been able to devise a method yielding by-product or joint-cost figures which does not embody a dominance of arbitrariness and guesswork. Here again the purposive character of accounting is given abundant opportunity; the distribution of amounts among the several products is determined by the desire to maximize sales.

Crude petroleum yields gasoline, fuel oil, kerosene, lubricants, coke and a miscellany of minor products. No complex processing explains the refinery practice of

allocating a heavier burden of costs to gasoline than to other products. Since less heat is required for the vaporization of the gasoline fractions, it might plausibly be argued that the heavier oil distillates should bear a greater portion of the costs. But in practice the costs assessed gasoline depend upon the prices obtainable for other products. The rationale for the allocation is simply what the traffic can be made to bear.[1]

An even more complex example is the railroads. Now and then a hardy soul, equipped with simple faith and a calculating machine, essays the adventure of rates based upon the true costs of particular services. The feat is, of course, technically impossible, for value judgments or empirical rules are essential to the distribution of overhead. A calculation of the real cost of transporting cotton-seed in less than carload lots from Lampassas, Texas to Kankakee, Illinois, is a stubborn exercise in imputation.

But even if they could be found, it would not be practical to establish charges upon particular costs. Freight large in bulk and low in value is accorded low rates; otherwise it could not move. High class freight pays its own way and contributes a surplus to the cause of transport. As they have grown up together, traffic and charges are adjusted to each other in an established system of rates. In any accounting which is more than an irrelevant academic exercise, costs reflect rather directly what the traffic will bear. In this a certain principle, common to Christian dogma and worldly policy, is present. Let joint services, in respect to their several abilities, bear the mutual cost. But when costs are set up as a standard of equity among differing prices, their allocation on the basis of what the traffic will bear or upon the money value of the product involves an argument in a circle. For if price can determine cost, how at the same time can cost be the basis for a judgment upon price?

Moreover, the calculations of costs are not immune to the practices of merchandising. The simplest case is the purposive distribution of costs to force one product to subsidize another struggling for a place in the market. Gasoline is in a relatively freer position than fuel oil which competes directly with coal. By a simple manipulation of cost figures gasoline can be made to furnish finance assistance to fuel oil in its battle for sales. But this is a bookkeeping transaction and has little effect upon total costs. The pressure of a substitute may, however, force a more imaginative use of the material to secure economies, the invention of labor-saving machinery or even the creation of new devices for cheapening the channels of distribution. All of this will have a vital influence upon costs.

[1] "Of the several methods of calculating joint costs the one most used is allocating costs to the joint products on the basis of selling prices, or selling prices less separable costs. In other words, it merely divides the joint costs for which we can find no other basis for division so satisfactory, on the theory that presumably value is put into the respective products in the same ratio in which value, as expressed by selling price, comes out." A. M. Fox, Chief, Economics Division, U. S. Tariff Commission, in talk before National Association of Cost Accountants, April 19, 1933.

In recent years a struggle of this sort has gone on between rayon and silk. Fifty years ago the rayon industry constituted nothing more than an obscure patent held under the French Government. Today it is established as a formidable rival and stands as a challenge to an almost complete displacement of silk. Not only have silk manufacturers suffered a decrease in volume of sales but they have been forced to lower their costs to be able to compete. This has been done by effecting every sort of economy in the processing and handling of silk—economies which up to the time rayon appeared were hardly dreamed of. The experience of the silk industry in the decline of costs and sales in unison has the flavor of paradox. It is an accounting axiom that volume has a direct influence upon unit cost. Many costs do not vary with size of output; a greater volume distributes costs over a wider area.

Here is another variation to be added to that bundle of variables called cost. Unit cost is antecedent—not subsequent—to sale. It is necessary to make some estimation of future sales; but at best it will be only an inexact guess. Moreover, such guesswork has a fair approximation to exactness only when all the factors affecting sales remain rather static. But an industry may be offering a new product; it may be battling against an aggressive substitute; it may be weathering a depression. Then the bases of statistical measurement are prone to go awry; and an estimate of future sales and distribution of costs is just so much pious hope or conservative hedging.

The position of the automobile industry a few years ago is rather typical. In the cost of the individual automobile, overhead costs play a large rôle; cheaper cars were put upon the market to increase volume and lower unit costs. But during the period when this country was becoming automobilized, there was no precedents for ascertaining demand; estimates of future sales followed a bewildering statistical ritual upon which was superimposed some pragmatic guesswork about the state of competition. But even after these superhuman calculations, the guesses were so conservative as to heavily over-assess the individual units for their share of overhead costs. No doubt a great amount of intent was responsible for the fact that 80% of the capital which went into business during those early years represented re-invested profits. But chance was not wholly absent.

The dependence of costs upon sales presents some trenchant problems to the accountant's art. Under the present scheme, a commodity is cheap in good years and expensive in bad years. When the consumer is most able to pay, he is assessed least; when he is least able, he is assessed most. When price should be made to encourage sales, it discourages them; when prosperity is likely to effect the increase, price gives its stimulus. Clearly, it would be wiser to effect a decline in price at the time volume falls; then a lower price would correct the tendency towards a decrease in sales. Such a policy would look beyond the yearly concept of the balance-sheet to cover the total cycle through prosperity and depression. A number of devices are already shaped towards that end and the task falls easily within the accountant's art. But the reading of such values into a scheme of accounts removes

still further prices for a base in individual costs. It presents a call from an opportunistic calculus to an accountancy which is an expression of an industrial policy.

If costs are the determinants of price, they are also determined by price. The manufacturer who builds a shoe to retail at $2.95 incurs his costs in terms of an ultimate price. The motor company doing a business in high-priced cars makes a conscious search for the better grade materials whose superiority can be demonstrated to prospective buyers. Women's dresses are made to fall into certain rigid price grooves; but if a dress meets unusual favor, its price goes up, and if it turns out to be a dud, no time is lost in the mark-down. The five-and-ten-cent-shops offer hundreds of major necessities and minor comforts of all within a price range accessible to all. Indeed there are few costs which do not adapt themselves to prices, which are to be paid for the commodity. Quality of material, care in wormanship, beauty of design, additional—detachable—conveniences, methods of marketing—all show gradations from worse to better and nimbly make the accommodation to price.

Less obvious are the conventional costs which show variability because price permits. Advertising is accorded the status of a necessary cost. Under public regulation the utilities are permitted to include this item as a legitimate expense. But they are interested in insuring a perpetuation of private ownership. Consequently, the liberty to include advertising as a cost was interpreted to mean the liberty to set up huge departments of public relations. Their primary task was to sell the present system to the public. Accordingly, the preparation of educational literature, the censorship of public school textbooks, the "contacting" of legislators, and the subsidizing of impartial research workers—all of these constituted "necessary costs" which the public dutifully returned in their rates. It could be done in the grand manner because the law allows price to comprehend "legitimate" costs.

Cigarettes sell at a price which make possible an indulgence in advertising. Consumption of the weed increased enormously during and after the war; a new impetus was given when a change occurred in our social customs and women took to smoking cigarettes. Cigarette manufacturers have come to associate that period of extensive advertising—made possible by large profits—with the change in social customs which made women smokers. This identification of two facts none too closely related has persisted; and now perhaps one of the most rigid costs on the cigarette manufacturers' expense sheet is that for advertising. Once the demand had increased, the larger output paid the bill, and advertising became a cost which price was expected to cover.

A less debatable item is labor cost. It is little more antecedent to prices than other expenses of production. The coal industry makes it clear that wages have more than an academic relation to profits. After the union struggle for recognition had been won, the victory had little effect upon wage rates because there ceased to be profits. In the sweep of technological advance coal found itself in desperate competition with oil and electricity. And in that struggle capital and labor have

been in the same boat. The "sick" textile industry is in a similar predicament. Ancient, honorable and bound in tradition, it is asked to make its way in a competitive market against strange new rivals. A part of the explanation for the low wage scale in textiles is the failure to make the new accommodation; the industry, receiving a low price for its products, is compelled to ask labor to take a low wage for its services.

Salaries, too, are rather price-made than price-making. The management has an opportunity to exploit strategic position and to convert potential profits into a fair return for personal services. An examination of a balance-sheet will indicate the reflection of the profit and loss account in executives' salaries. But in some businesses even such emoluments are being set down as a fixed cost. As management becomes separated from investment, officials are accorded an opportunity to vote to themselves huge salaries at the expense of other claimants upon corporate income. But even to a hold-up of such correctness there are limits. The flexible part of the salary called the "bonus" is avowedly based upon the value of the service of the official for which there is no other tangible measure than the profits of the business. Accordingly, personal worth is a vacillating thing which waxes in fat years and shrinks in a depression.

V

Nowhere in all the domain of business does cost make its direct mathematical way in price. The route along which the two pass is not a one way street. In a continuous accommodation, through a mutual dependence upon profit-making cost and price in unorthodox fashion are forever remaking each other.

The modern cost accounting system has been created *by* and *for* business management. It is intended to serve its purposes. And cost—for all its singleness of pecuniary aim—is no one thing. It is not fixed. It is not static. It is susceptible to every shade and variety of gradation. Its color and character reflect the enterprise which it serves.

Upon this fluctuating mechanism indigenous to business, it is proposed to establish standards for mercantile justice. It is cost which is to decide what price differences are valid and what lie beyond the pale of the law. And this raises questions which run from calculation, through administration, to public policy. Can costs, which reflect an organic business, be subdued into a weapon of commercial police? Can concepts be sharpened, accounts disentangled, and expenses distributed so neatly and conclusively to make of discrimination an objective fact? Can the courts supervise a pecuniary domain, establish accounting practices, and resolve issues which turn upon a quantitative expression of the events of business? If success can be made to attend the venture, will it be through an esoteric ritual to which industrial fact will be invited to conform? And will the trend be towards freezing into a rigid structure a system of marketing arrangements which the public interest demands be made flexible?

In the midst of such problems the sheer mechanics of cost accounting presents no simple enigma. A venture into control, such as the Robinson-Patman Act, enters new territory. An experience of some decades with public utilities falls short of a guide. A gas plant, a street railway, a waterworks is a "natural monopoly," usually serving a single community. Its rates for a single product can with some exactness be established upon the costs of a single business venture. Only in the case of railways is the element of competition even partially present; and there regulation is confronted with conditions too distinctive to furnish an analogy. But the industries which manufacture and merchandise are congeries of unlike establishments in the clutch of swift change. Each is a going concern which must, in the name of survival, pick up what business it can and in the process yield such terms as it must. To enthrone cost as the governor of the bargaining process is to change the character of business enterprise.

All of this is to reveal the heroic character of the venture ahead, not to condemn the Act. It will lure the courts into a domain of industrial reality from which they can hardly escape without education. It is an experiment which presently will reveal its own defects and invite abandonment or amendment. In the process it will yield knowledge in the ways of industry and produce mechanisms of control essential to an imminent venture into regulation which is hardly to be avoided. And it may posit sharply and insistently the problem of justice between buyer and buyer and seller and seller in the market.

The cost-price provisions of the Robinson-Patman Act invite a hazardous attempt at police. In its administration it seems destined to raise more questions than it settles. If it can shape confused problems into clean-cut questions, it may well blaze the way towards bringing marketing within the domain of law and order.

MARKETING FUNCTIONS AND COSTS AND THE ROBINSON-PATMAN ACT

MALCOLM P. MCNAIR*

The several types of legislative restriction on freedom in pricing, including the Robinson-Patman Act, state "fair trade" (resale price maintenance) acts, and various laws actual and proposed to prevent selling below cost, and to restrict or prevent the use of so-called loss leaders in retail selling, all have a common social ancestry. They stem broadly from the sentiment for protecting the small merchant against his larger competitors. They belong, in other words, to the same family as the discriminatory chain store tax measures. In an era when security is the watchword, these laws represent the determined drive of certain groups of retailers and wholesalers to improve their economic position and make it secure against the stresses of competition.[1] There are, of course, other strains in the ancestry of these measures, but the urge to obtain security for the little fellow is the predominant one.

The average business man, unless he belongs to a group benefited by these laws, is likely to characterize all these restrictions on his pricing freedom as governmental interference and regimentation, objectionable outgrowths of the New Deal. Actually, however, these particular developments are quite alien from one aspect of the New Deal, namely, the trend towards economic planning and state socialism, as exemplified, for instance, in the Tugwellian philosophy. The thoughts of the economic planners run more in the direction of permitting the development of large businesses to the point where the state can assume control of key production and distribution industries without having to direct the destinies of hundreds of thousands of small enterprises. But the Robinson-Patman Act was not fundamentally a New Deal measure. In fact the sentiment which fathered this Act and its various blood relatives has in it more that is reminiscent of the beginnings of the Nazi movement in Germany, where the same zeal was displayed to protect the small business man

* A.B., 1916, A.M., 1920, Harvard University. Professor of Marketing and Director of the Division of Research, Graduate School of Business Administration, Harvard University. Author of *Retail Method of Inventory* (1925); *Problems in Retailing* (1926) (with D. K. David); *Problems in Retail Distribution* (1930) (with C. I. Gragg); *Problems in Retail Store Management* (1931) (with C. I. Gragg). Contributor to *Harvard Business Review*.

[1] This purpose is amply revealed by such statements as that of Representative Patman, speaking at the annual convention of the United Independent Grocers and Food Dealers Association in New York on April 11, 1937: "Chain stores are out. There is no place for chain stores in the American economic picture."

from his large competitors. Ultimately, perhaps, both roads may lead to the totalitarian state; but at the outset they fork in different directions.

Such speculations take one far afield. Possibly a more realistic observation would be to this effect: government having to an increasing extent abandoned its impartial rôle of umpire in favor of one of partisan interference, small retailers, aware of the tariff favors bestowed on manufacturers in previous years and more recently observing the benefits distributed to farmers, have now organized themselves to exert pressure with a view to making their own economic position more comfortable. Of course it goes without saying that all these seekers of advantage march boldly forward with good conscience under the banners of public welfare.

These various legislative measures attack the pricing problem in two places. One approach is the regulation of pricing practices as between business sellers and buyers in wholesale markets. The other approach is the regulation of pricing from the retail selling end. The first of these approaches has resulted in the Robinson-Patman Act. The proponents of this measure, skilfully taking advantage of the sentiment in Congress against monopolies, used the monopoly argument (although as applied to retailing it will not bear careful examination) as a stalking-horse and thereby succeeded in attaching the Robinson-Patman Act to the Clayton Act, where it does not belong.[2] The other approach, the regulation of retail selling prices, has taken two avenues: (1) extension of the resale price maintenance privilege to owners of trademarks by means of "fair trade" acts now on the statute books of 30-odd states and (2) the prohibition, either by state law or by trade practice agreement, of selling below cost.[3] The California Unfair Practices Act,[4] for instance, a practical

[2] See Learned and Isaacs, *The Robinson-Patman Law: Some Assumptions and Expectations* (Winter, 1937) 15 HARV. BUS. REV. 137.

A price differential becomes a discrimination when it is made between parties who are in such circumstances and have such common interests as to be entitled to equal treatment, for instance, manufacturers or merchants who compete with one another in the direct or indirect resale of particular goods. The price discriminations which are outlawed by this Act (unless they can take refuge under some of the enumerated defenses) are those made between different purchasers of commodities of like grade and quality in interstate commerce "where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or *to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or the customers of either of them* . . . " Robinson-Patman Act, §1(a).

The important phraseology here added to that of the Clayton Act is that italicized above. As Professors Learned and Isaacs point out, "Here we have obviously departed from the old philosophy and tried to save men from the ravages of competition. But once more the draftsmen of the Act have been very adroit. They do not condemn in words the injury of certain competitors. They still talk as if the thing condemned is injury to competition. It is unlawful to engage in price discrimination . . . the effect of which may be to injure, destroy, or prevent competition with certain persons. What is the difference between hurting the corner grocer as an incident of competition with the chain and hurting his competition with the chain? If the corner grocer must lop five cents off the marked price of a can of peas to meet competition, he is hurt, but is his competition hurt within the meaning of the statute? If the answer is 'yes,' then the wording of the statute is grossly misleading. It is an anti-competition statute slipped into the anti-trust laws. And since it stops competition at the level where it is most effective in American business, the only level where aggressive buying makes inroads on fixed prices, it amounts to a repeal of the anti-trust policy in a very important part of American business." Learned and Isaacs, *supra*, at p. 139.

[3] Such restrictions apply both to manufacturers and to distributors, but apparently are aimed principally at retail distribution.

[4] Cal. Stat. 1935, pp. 1546-1551.

duplicate of which is now on the statute books of at least five other states, provides that it shall be unlawful to sell below cost, this term as applied to distribution cost to mean invoice or replacement cost plus the particular distributor's cost of doing business, defined to comprise labor (including salaries), rent, interest, depreciation, selling expense, maintenance, delivery, credit losses, licenses, taxes, insurance, and advertising. Virtually similar provisions are found also in the Trade Practice Rules for the Rubber Tire Industry promulgated by the Federal Trade Commission. Other legislative remedies, less drastic in character, contemplate prohibition of sales either below invoice cost or below invoice cost plus some stated percentage, such as 6%. Proposals along these lines have been endorsed, in fact, by such organizations as the National Retail Dry Goods Association and the Associated Grocery Manufacturers of America.

Although there is a common social sentiment behind all these measures and although they have been sponsored and pressed for enactment by substantially the same business groups,[5] the logic of laws giving owners of trade-marks the privilege of resale price maintenance is quite clearly a different logic from that which runs through all these other laws and proposals. It is a logic which disregards costs (indeed one of the chief arguments against price maintenance is the fact that it takes no account of differences in the cost of distribution), whereas the logic of the Robinson-Patman Act and of such measures as the California Unfair Practices Act rests very largely on costs; costs are taken as the criterion of fairness or unfairness.

This emphasis on costs is understandable. The notion that price should typically be based on cost plus a fair profit is quite thoroughly ingrained in the minds of many business men. Although from a strict economic standpoint there is no reason why price differentials should not be as readily explainable by factors on the demand side of the equation as by factors on the supply side, the business man not infrequently seems to have some sense of guilt about selling at a price which cannot be "justified" on an ordinary accounting basis; and the same feeling that price differentials ought always to be explainable in terms of costs undoubtedly is a natural one on the part of the buyer who fails to receive as low a price as his competitor. Some of the responsibility for the prevalence of this point of view attaches also to the marketing experts who have steadily urged the virtues of price stability and long-run "scientific" price policies. Observing the general success of the one-price, non-higgling policy in retail business, these authorities have advocated a similar policy to govern dealings in wholesale markets. Accountants must also share in the responsibility, because of the importance which many of them have attached to cost accounting as a major basis for price determination. Both the marketing experts and the accountants, of course, have been substantially aided and abetted by trade association executives in the promulgation of these ideas. It is therefore not surprising that even prior to the N.R.A. the very term "price cutting" carried with it a

[5] *Cf.* Grether, *Solidarity in the Distributive Trades in Relation to the Control of Price Competition*, *infra*, p. 375. ED.

connotation of opprobrium, and that in the enthusiasm of the early N.R.A. period a view gained wide acceptance to the effect that the unfair practice of selling below cost was retarding recovery, that "price cutters" and "chiselers" made it difficult, if not impossible, for honest men to do business at a fair profit.

Actually the doctrine that the only fair prices are those which are based on costs, and that price differentials which cannot be justified in terms of costs are therefore unjustly discriminatory, is bad economics and impossible accounting. It is essentially a denial of the economic function of price; it leaves pricing a one-sided matter, with the price-making function largely in the hands of the seller, and the edge removed from the demand blade of the pricing scissors. Developments in the direction of requiring that the prices of particular goods be based on average accounting costs for the period are, on the whole, conducive to something less than full employment and to failure effectively to explore the potentialities of elasticity in lower strata of demand; for numerous situations exist where there is unused plant capacity or where industries are subject to decreasing costs, and where consequently a discriminatory price policy makes possible larger output and larger employment. (This principle is, of course, well understood in the public utility business.)

There is also the point that seller-administered prices are conducive to price rigidity. Logically, perhaps, there is no need that this should be the case, no necessary conflict between that form of price stability represented by an administered, one-price policy and the desirable degree of price flexibility to accommodate changing business conditions. In theory a manufacturer maintaining close touch with his market ought to be able to effect the necessary changes in his own price schedule without at any time indulging in price discrimination. Practically it does not work out that way. A manufacturer who has developed a one-price policy is usually very loath to change his price. He necessarily is taking a rather long-run view of the situation; and so he insulates himself to a considerable degree from the impact of market forces, believing that he can maximize his profits over a period by adhering to his established price. Keeping the price unchanged is the path of least resistance. It avoids potentially troublesome adjustments with wholesalers and retailers with respect to stocks of goods already in hand. It avoids also any difficulty which might be encountered in raising prices later in the event of a change in market conditions. Manufacturers frequently hesitate to make downward price changes for fear of "spoiling the market" in case demand proves to be inelastic, and they commonly do not differentiate between a change in relative prices and an adjustment to a changing price level. At best there are many factors which are likely to retard price changes, and as a practical matter these factors are strongly reinforced by a one-price policy. As abundantly demonstrated during the depression, there are numerous manufacturers who will resort to many expedients before they will change prices; they will even in some instances reduce production and lay off labor first. This kind of price policy is already far too prevalent among American business men; and the Robinson-

Patman Act and other fair trade laws, with their emphasis on cost as the criterion of fairness and their consequent encouragement of one-price policies, promise to make a bad matter worse. American business has already worshipped too long at the shrine of price stability.

It is frequently inquired why, if the one-price system, that is, the same price to all comers, with no higgling, works so admirably in retail business in America it would not be similarly advantageous to place wholesale prices on the same basis. Superficially, the analogy seems to be good; but there are vital differences. For one thing, consumers are not actuated by the profit motive; they are not buying for resale. Also, consumers patronizing any particular retail store for the most part stand on a fairly similar basis as to quantities, services required, and the facilitating functions which they themselves are prepared to perform. But among customers of a wholesaler or manufacturer such a similarity is not to be found; it is probably less likely to be found today, with the evolutionary changes that have taken place in the system of distribution, than it was 40 or 50 years ago. Again, the technical ability of consumers to look out for themselves is by no means comparable to that of commercial buyers; the admonition *"caveat emptor"* has properly fallen into disuse in enlightened retail circles. Furthermore the one-price system of retailing prevails principally for goods on which the potential saving that a consumer can obtain by higgling is, on the whole, not worth the time required; but in the case of consumers' goods of high unit value, automobiles, for instance, where the potential saving bulks larger, the practice of higgling still rules, in the form of shopping for the best trade-in allowance. Price is essentially two-sided; there are two sets of motives and two sets of calculations. Price is what the market will pay and what the seller will accept. In a great majority of retail transactions, particularly the small ones, this two-sided character of price is waived by mutual consent; but this fact does not mean that we can safely dispense with the process of bargaining in the whole economic structure. When consumers waive the bargaining privilege, they in effect commission retailers to do their bargaining for them. Hence the substantial elimination of individual bargaining in retail trade is a fact which strengthens rather than lessens the need for bargaining as between retailers and their suppliers.

There is also grave difficulty from an accounting standpoint in making costs the criteria of fairness or unfairness in pricing. Even the manufacturing costs of a particular commodity, especially one produced in conjunction with other items, do not have by any means the precision and validity which legislators seem to suppose; and when it comes to distribution costs, the allocation of overhead items to particular products is largely meaningless. Even if distribution cost accounting were not in its present rudimentary state, the expense of the record-keeping necessary to enable a wholesale grocer, for instance, to determine with any approach to accuracy the cost of handling the XYZ brand of canned peaches might easily be prohibitive. The numerous and varied interrelations of commodities from a sales standpoint, and the

large proportion of the distributor's expense which is overhead in character, *i.e.*, not incurred directly and solely in the purchase, storage, handling, and sale of any one particular commodity, make itemized distribution cost accounting largely a fallacious procedure. Essentially a merchant's profit is derived from his whole output of sales over a period; it is his total dollar gross margin on that output less his total dollar expense for the period. To endeavor to regard net profit as a sum total made up of individually calculated net profits, over and above allocated costs, on each item or line of merchandise handled, is repugnant both to good economics and to good management.

Aside from these economic and accounting difficulties, of which this brief mention has been made, there is another serious objection to a program of legislative reform of trade practices which tends in the direction of outlawing price differentials not based on ascertainable differences in costs. This objection, which applies particularly to the Robinson-Patman Act, grows out of the great variety of marketing functions and the constant shift and change in the grouping of those functions; and it is with this part of the problem of costs that this paper is particularly concerned.

It is no longer possible to take a simple institutional view of the marketing field. Any marketing text book today which proceeded merely to describe and define the principal institutions engaged in distribution, such as the manufacturer's sales organization, the broker, the wholesaler, and the retailer, and to assign definite groups of functions to each of these would, if it went no further, be dangerously unrealistic. Indeed, there probably never has been a time when such a purely static view would have been adequate; but at a somewhat earlier period in the nation's history it was more nearly true than it is today that a certain group of functions belonged rather definitely to the manufacturer, another group to the wholesaler, and still another to the retailer. The manufacturer, for instance, determined what was to be made, designed the product, owned the trade mark, manufactured the goods, advertised them to consumers or to members of the trade, and employed salesmen to sell the goods to wholesalers. Wholesalers bought goods in large quantities, usually from a number of manufacturers, carried stocks from which to fill orders, and sent out a salesforce to solicit business from retailers. Retailers, in turn, bought in smaller quantities from a number of wholesalers, maintained a variety of goods for selection, arranged them in suitable displays, perhaps advertised to consumers, and employed salespeople to stand behind the counters and wait on customers.

This very elementary picture never was wholly true even in the horse and buggy days; but certainly in the years before 1910 it came somewhat nearer to being an adequate representation of the state of affairs than it does today; and, unfortunately, the pseudo-simplicity of this A B C marketing structure seems to have commended it, in the minds of many people, as the suitable and appropriate arrangement, any deviations from which are to be discouraged.

Obviously one major break in this simplified structure occurred when some

manufacturers, dissatisfied with the services of the existing wholesale middlemen, themselves undertook the performance of wholesale functions, sending out a substantially augmented salesforce to sell directly to retailers in small quantities, and arranging to carry stocks of finished goods for immediate delivery either at the factory or in branch warehouses. Naturally these manufacturers sold to retailers at prices higher than those at which they formerly had sold to wholesalers, in order to cover the costs of the additional functions which they had assumed. Another break in the traditional institutional picture of marketing came when some wholesalers began to use private brands. With respect to goods sold under these brands they were assuming the merchandising function: they owned the brand; they did the advertising; they laid down the specifications for the product, buying, perhaps, from a number of different manufacturing sources; and they assumed the responsibility for the quality of the goods. Here also the costs shifted along with the functions; the wholesaler selling under a private brand naturally paid lower prices, since the manufacturer was released from the advertising and other costs which the wholesaler had to assume by virtue of his private brand policy.

Even more important than the development of private brands by wholesalers has been the assumption of a number of wholesale functions by various types of retailers. Consider the difference between the position of the small neighborhood store and that of the large department store or chain. The proprietor of the small store buys to a considerable extent from wholesalers; but whether he buys from wholesalers or manufacturers, it is characteristically the case that the vendors come to him, rather than that he goes to them. The regular salesmen of manufacturers and wholesalers, the window dressers, the truck delivery men, all come to the stores. The proprietor need scarcely stir from his establishment to look over the complete range of merchandise which he might conceivably offer his customers. This situation is in marked contrast to that of the large department store, for instance, sending its buyers at regular and frequent intervals to visit the important markets, not alone in the United States but throughout the world. The big retailer typically goes to the vendors, many of whose marketing functions are thereby performed in a reverse manner, so to speak. When manufacturers or other vendors deal in this way with their customers, they have relatively small selling expenses. Instead, the customers have large buying expenses. In the one instance the cost of certain marketing functions is a vendor's selling expense, and consequently appears as part of the cost of goods to the retailer; whereas in the other instance the cost of the equivalent marketing functions appears as part of the retailer's expense of doing business.

This reaching out by the large retailer to embrace in his scope of action a wider sector of the marketing task is particularly well illustrated by the operations of large grocery chains. These concerns are essentially combination retailer-wholesalers; they have integrated the retailing and wholesaling functions.[6] They buy 90% or more

[6] For instance, the U. S. Census for 1930 makes the following statement: "Stores are only a part of the activity of chains. . . . Chains combine in the one organization the function of wholesale and retail

immediately from manufacturers and other direct sources and their agents;[7] take deliveries, frequently in carload lots, in their own warehouses; break bulk; carry on packaging operations; ship assorted smaller quantities by truck to several hundred of their own stores on requisition from store managers; advertise to consumers through a variety of media; apply their own brands to many products; maintain effective direction and control of store managers by means of an elaborate organization of supervisors and superintendents; and frequently conduct such manufacturing operations as baking bread or roasting coffee. Their warehouses and merchandise distribution systems on the physical side, their organization of supervisors and superintendents on the personnel side, and their private brands and advertising on the promotional side—all these clearly are the counterpart of the wholesaler.

Although formerly the institutional labels "wholesaler" and "retailer" may have carried with them the connotation of certain groups of functions, at the present time any merely institutional view of the marketing procedure is wholly inadequate to bring into perspective such an integration of distribution functions as is represented, for instance, by the operations of the J. C. Penney Company in buying cotton in large quantities, laying down specifications for the goods to be manufactured, having the manufacturing done on a contract basis, affixing its own brand name, and promoting the sale of the goods through some 1,400 of its own stores.

It is in this integration of the marketing tasks that some of the principal opportunities for economy in distribution are to be found. When salesmen for a number of competing wholesalers are calling on small retail outlets throughout a territory, each crossing and recrossing the other's tracks, and many of them taking small orders from the same concerns, there is obvious lost motion and waste of man power. Contrast this situation with that of a chain: the store managers draw all their merchandise from a single source; the quantities delivered at a single time are substantial; the tasks of ordering goods, supervising stocks, checking displays, and so on, are regularized to reduce lost motion to a minimum; supervisors, superintendents, and traveling auditors have their appointed tasks; and all goes forward according to routine. It is principally because these dual functions of the wholesaler and the retailer can be accomplished at lower costs when combined in a single organization that chain stores can sell at lower prices, even after the difference in services rendered, such as credit and delivery, is taken into account.

To illustrate, the following figures, based principally on reports of the *Census of American Business: 1933*,[8] show that consumers can realize a saving of approximately 15 cents out of the sales dollar by patronizing chain drug stores rather than independent drug stores.

distribution" U. S. BUREAU OF THE CENSUS, 15TH CENSUS, CENSUS OF DISTRIBUTION, *Retail Chains* (1933) 8-9.

[7] Fed. Trade Comm'n, *Chain Stores: Sources of Chain-Store Merchandise*, SEN. DOC. No. 30, 72d Cong., 1st Sess. (1932) 15.

[8] U. S. BUREAU OF THE CENSUS, CENSUS OF AMERICAN BUSINESS: 1933. It is recognized that the expense data in the Census are quite far from being fully satisfactory. There are other surveys which

Consumer Saving by Chain Distribution in the Drug Field

$1.00

54 cents MANUFACTURER Costs, Selling Expense, and Profit	12 cents WHOLE- SALER Expenses & Profit	34 cents INDEPENDENT RETAILER Expenses and Profit

85 cents

54 cents MANUFACTURER	31 cents CHAIN	15 cents CONSUMER SAVING

The calculations in round figures on which the above diagrams are based are as follows:

	$1.00	Consumer's dollar spent at independent retail drug store
Subtract 32 cents		Expense of operating independent drug store[9]
2 "		Profit[10]
———	.34	Independent retailer's expenses and profit
	$ .66	Wholesaler's price to retailer
Subtract 11 cents		Wholesaler's expense of doing business[11]
1 "		Profit[12]
———	.12	Wholesaler's expenses and profit
	$ .54	Manufacturer's selling price (Cost of production, plus selling expense, plus profit)

Assuming that chain buys same product from manufacturer at same price:

	$ .54	Cost of goods to chain
Add	.31	Expenses and profit of chain[13]
	$ .85	Chain's price to consumer[14]

afford more reliable figures for selected samples in particular years, but figures from these sources for all three types of distributors, namely, wholesale druggists, independent retail druggists, and chain drug stores, are not available for any one recent year. The comparison here shown also is likely to be somewhat more conservative, that is, less favorable to chains, because of the probability that errors in the Census data tend to cause understatement of the independent retailer's expenses.

[9] Total operating expense for independent drug stores in 1933 = $31.80 per $100 of sales. See U. S. BUREAU OF THE CENSUS, CENSUS OF AMERICAN BUSINESS: 1933, *Retail Distribution: Drug Retailing* (May, 1935) 9.

[10] Estimate of 2% profit based on several private surveys.

[11] Total expenses of wholesalers of drugs and drug sundries in 1933 = 17.3% of sales. See U. S.

These figures show that in situations where chains buy directly from manufacturers and combine the wholesale and retail functions under one overhead it is possible for a substantial saving to be effected. This illustration, furthermore, does not take into account the probable saving in selling expense which the manufacturer may realize through dealing directly with a large chain. That the theoretical saving arrived at by the above calculations is in no sense an exaggeration is attested by such studies as that described in the final report of the Federal Trade Commission on the Chain-Store Investigation, in which it is stated with reference to retail drug prices that "the geometric average of chain and independent prices, when weighted by chain and when weighted by independent volume, indicates that the prices of independents are from 14.527 percent (Detroit) to 22.72 percent (Washington) higher than those of the chains in the four cities studied by the Commission. . . ."[15]

Integration of functions rather than large buying power is the principal source of chain store economies. The fact that the wholesale function when combined with the retailing job can be performed at a much lower cost is definitely indicated by the findings of the *Census of American Business: 1933*, again relating to the drug trade. The costs of operating the central office and warehouses of chain drug companies were stated to be $3.30 per $100 of sales,[16] whereas the operating costs of wholesale institutions handling drugs and drug sundries were found to be $17.30 per $100 of sales.[17]

A broadly similar line of reasoning applies to advertising allowances. The closely knit organization of a chain not infrequently can accomplish certain parts of the sales promotion function more economically than can a manufacturer. It has long been recognized that consumer advertising loses greatly in effectiveness unless it is supplemented by advertising, display, and promotion at the point of sale. Hence many manufacturers make large expenditures for dealer helps, displays, circulars,

---

BUREAU OF THE CENSUS, CENSUS OF AMERICAN BUSINESS: 1933, *Final United States Summary of Wholesale Trade in 1933* (Nov., 1934), Table 2A, p. 8. If wholesaler's sales are 66 cents, 17.3% = 11 cents.

[12] Conservative estimate, based on common figure for net profit of 1.3% of sales (over and above interest on investment) for 129 firms in 1924. See HARVARD UNIV. BUREAU OF BUSINESS RESEARCH, BULL. No. 50, *Operating Expenses in the Wholesale Drug Business in 1924* (1925).

[13] Costs for chain drug stores with fountains in 1933 = $32.06 per $100 of sales. U. S. BUREAU OF THE CENSUS, *op. cit. supra* note 9, at 9. Profit estimated at 4%. (Net gain of 34 chains reporting to Harvard University Bureau of Business Research = 2.65% of sales in 1932. See BUREAU BULL. No. 94, *Chain Store Expenses and Profits: An Interim Report for 1932* (1934), Table 13, p. 20). Gross Margin (32% + 4%) = 36% of retail sales equivalent to 56.3% on cost. On a cost of 54 cents, this equals 30.5 cents.

[14] Final figures for the Census of 1935 are not as yet available in sufficient detail to permit a precisely similar computation for the later year. A rough calculation of the same general type based on the Census figures for 1935 (in which an allowance for proprietor's salary is the chief element omitted), but using 4% of net sales as the estimated profit both of independent drug stores and of chains, indicates a chain selling price in 1935 of approximately 88 cents for goods sold through independent drug stores at $1.

[15] Federal Trade Comm'n, *Chain Stores: Final Report on the Chain-Store Investigation*, SEN. DOC. No. 4, 74th Cong., 1st Sess. (1935) 31.

[16] U. S. BUREAU OF THE CENSUS, CENSUS OF AMERICAN BUSINESS: 1933, *Retail Distribution: Drug Retailing* (May, 1935) 13.

[17] U. S. BUREAU OF THE CENSUS, *op. cit. supra* note 11, at 8.

window-trims, and so on. When such efforts are applied to a large number of independent retailers, however, there is much lost motion; and it was early discovered that a chain can utilize its own supervisory and promotional organization, its advertising copy, hand bills, displays, window-trims, bulletins to managers, and so on, to accomplish the same results more effectively and at a lower cost than a manufacturer could do it for himself. Recognition of this fact has led some manufacturers to relinquish part of their promotional functions to chains, a price differential naturally resulting. In other words, in the case of chains and some other large-scale retailers there clearly exists an economic basis for *bona fide* advertising allowances. (This is not to assert, of course, that all advertising allowances are *bona fide* in character.)

Some shifting of functions also has occurred with respect to brokerage. The broker's task is a genuine marketing function, that of establishing contact between buyers and sellers. In some lines of business, textiles, for instance, the brokerage function commonly is performed by independent concerns having no regular or permanent affiliations either with buyers or with sellers. In other fields, notably the food trades, the broker is essentially a manufacturer's sales representative having close relationships with a number of manufacturers whom he serves by finding customers. In these same trades the opposite situation also is to be observed, where the brokerage function is integrated with the buying side, the broker's job then being that of seeking out prospective sellers. Since the brokerage function *per se* is that of arranging contacts between buyers and sellers, there is no essential reason why a broker who is part of a chain grocery store organization does not perform as typical a brokerage function when he establishes contacts with canners who have a certain grade of fancy canned corn available for delivery as some other broker regularly retained by these canners might perform in seeking out chains which were in the market for that particular commodity.[18] Under such circumstances there is

[18] A report in the *New York Herald Tribune* for April 16, 1937, of hearings before the Federal Trade Commission on charges that the Great Atlantic & Pacific Tea Co. and six food packers had violated the Robinson-Patman Act, through special discounts and allowances in lieu of brokerage, described testimony in regard to the services rendered to sellers by A. & P. buyers:

"One of the witnesses examined yesterday was J. M. Zoller, field purchasing agent of the A. and P. Company, with headquarters at Baltimore. His purchases for the company, he testified, amounted to about $1,000,000 a month, mostly in canned goods, on which formerly he received a brokerage averaging about 5 per cent. Mr. Zoller was a salaried employee of the A. and P.

"When the Robinson-Patman Act became operative he ceased accepting the brokerage allowances, but, it is contended by the Federal Trade Commission, the A. and P. continued to benefit in allowance from sellers in the form of discounts, although they were held in escrow or in abeyance. Mr. Zoller testified that he ran his office as a brokerage office.

"Another witness was Ralph Polk, head of the Polk Company, Haines City, Fla., growers and canners of grapefruit, from which the A. and P. has been a large buyer. Asked by Mr. Feldman [counsel for the Great Atlantic & Pacific Tea Co.] to describe the different type[s] of brokers with whom his company did business, Mr. Polk said that [one] type was the broker 'with accounts more or less steady' and another, a broker who had no regular outlet or supply.

"'He is a go-between between producer and buyer,' said Mr. Polk. 'I have heard a broker say he didn't know whom he represented. But he has a very legitimate place in the business.'

"A question by Mr. Feldman that met strenuous objection from commission counsel was: 'Are the

nothing inappropriate in compensation paid by a seller to a broker who is a subsidiary of the buyer. (Again the caveat must be entered that this explanation by no means guarantees the *bona fide* character of all brokerage allowances.)

The sum and substance of the matter is that under the stress of competition a majority of the marketing functions are susceptible of being shifted; there are scarcely any of them which can be regarded as the inalienable property of any particular marketing institution. Hence any purely institutional view of the marketing scene is woefully inadequate. Rather than looking simply at institutions, one must look to see where the functions are performed; and of course the costs go broadly with the functions.

In all this shifting and realignment of marketing functions and the consequent changes in the attributes and character of institutions, many manufacturers inevitably find themselves with a problem of scrambled distribution. Their goods move through a variety of channels, and there may be little uniformity among the several patterns of distributive functions performed. For part of his output a manufacturer may carry on an extensive group of marketing functions; for another part only a limited group. The Goodyear Company, for instance, sold its own brands of tires to selected independent tire dealers throughout the United States. It laid down the specifications, designed the products, advertised them extensively, employed a large force of salesmen to call on retail dealers, maintained wholesale branches at which stocks were carried for immediate deliveries, and undertook a broad program of dealer assistance. These tires were one part of its output; but there was another part, the tires sold on contract to Sears Roebuck. For these, Sears laid down the specifications, owned the brand, did all the advertising, assumed responsibility for the quality, and performed the handling functions through its own warehousing, mail-order, and store organization. The price differentials in this case, therefore, were related to differences in functions far more than they were to differences in quantities.

Some commentators, viewing these scrambled distribution situations, have been inclined to ascribe them to a mania for volume sales on the part of both manufacturers and distributors and have suggested that a wise manufacturer would in general adhere to one fixed pattern of distribution and thereby avoid complications. This clearly is too static a view. It overlooks changes in conditions affecting distribution, the rise of new institutions, and the continual search under competitive pressure to find more economical groupings of functions, all this taking place against a background of distribution costs that are advancing inevitably in response to the evolution of the industrial and social system. A manufacturer, as a practical

services rendered by Mr. Zoller the same as rendered by independent brokers?' Mr. Polk was not permitted to answer this question.

"'As a matter of sound merchandising policy, was the value in dollars and cents of the services rendered by Mr. Zoller the same as that of independent brokers?' Mr. Feldman asked.

"'Yes,' replied Mr. Polk."

matter, frequently is forced to straddle. Perhaps most of his merchandise still goes through wholesalers and small independent retailers, but in view of the increasing importance of chains he will cut himself off from too large a part of his consumer market if he does not sell some of his goods through them; and, looking to the future, he does not dare place sole reliance on a single channel of distribution which may conceivably dwindle and dry up.

Among the earliest straddles of this type were those made by manufacturers who decided to sell part of their output directly to retailers while continuing to sell the rest of it through wholesalers. The trade discount was the characteristic pricing device used to meet the requirements of this situation. The trade, or functional, discount is a percentage reduction from a list price offered to a particular classification of customers and differing from the percentage reduction granted to some other classification of customers. For instance, if the list price is the suggested resale price to consumers, a discount of 33⅓% may be accorded to retailers making direct purchases and a discount of 33⅓% less an additional 20% may be given to wholesalers. Trade discounts have no direct relation to the quantities involved; at times, for instance, a wholesaler may place fill-in orders no larger than those typically received by the manufacturer from retailers, but the wholesaler is nevertheless "protected" by the trade discount. This pricing device has proved most useful in selecting customers and shaping distribution policies.

The relation of trade discounts to costs is not a simple one. When wholesalers are accorded a trade discount of 20% of their selling prices to retailers, the implication is that a 20% margin is sufficient to cover the operating costs of the wholesalers and leave a net profit. This is an average mark-up which the wholesaler seeks to obtain from as many manufacturers as possible, and in a competitive situation manufacturers who are seeking the services of this wholesaler to handle their products are almost certain to be more strongly influenced in naming a rate of trade discount by the general requirements of that particular class of wholesaler than by the substantially less tangible estimates of what it would cost them to do the same work. This will surely be the case when, as often, the wholesaler, already carrying a wide line of products, is in a stronger bargaining position than the manufacturer, seeking outlets for his single line of merchandise.

Or consider the case of a shoe manufacturer who, following the usual practice in the shoe trade, sells direct to retailers and who wishes, for the sake of more complete market coverage, to sell both to independent retailers and to department stores. The department store is a different type of retail institution from the independent shoe store, with a different organization, different methods of doing business, and consequently a different cost of operation, a higher cost, as it happens. Therefore the department store expects a higher trade discount, even though in the particular instance the shoe manufacturer sends the same salesmen to call with about the same frequency on both department stores and independent shoe stores. Thus a trade

discount is a functional discount because it takes cognizance primarily of the costs of the functions performed by the particular class of distributors to whom it is given. The connection is closer with the costs of the buyer than with the costs of the seller.

In regard to the seller's situation, the trade discount is at best only a broadly generalized reflection of costs. In the individual instance, if a retailer and a wholesaler should each place an order at the same time with a manufacturer for a carload of the same product, consequent upon a single call by a salesman, it would be difficult indeed to detect any difference in the manufacturer's costs with respect to the two orders. Over a period of time, however, it certainly would cost the manufacturer more to sell to retailers than to sell to wholesalers. He would have to carry larger stocks, send out a greatly augmented salesforce to make more frequent calls on a much larger number of customers, give more dealer helps, ship in smaller quantities, possibly provide local distribution points, and so on. These additions to the manufacturer's marketing costs might be approximately the same as the wholesaler's costs; they might be less; or they might be more. A manufacturer of a single line of products of relatively low unit value commonly is at a serious disadvantage if he tries to do his own wholesaling over any extensive territory; his costs will be far greater than those of a wholesaler who is able to spread his costs, particularly his salesforce expense, over a large number of items. This is a common situation in the grocery, drug, and hardware businesses. Where the unit of sale is larger, or the manufacturer's line of products more extensive, no great disparity may exist between the costs of independent wholesalers and those of manufacturers' wholesale branches; and where, in addition to these conditions, specialized knowledge or technique is required, a manufacturer may be able to apply these to the performance of his own wholesale function with resulting lower costs than might be incurred by an independent wholesaler.

A trade discount, of course, does not merely cover the buyer's costs. Ordinarily there is some allowance for profit. How large this allowance shall be depends partly on the policy and needs of the seller. A manufacturer may desire to build up his distribution through certain trade channels and consequently may offer (indeed may find it necessary to offer) a large profit margin in his trade discount in order to induce these particular middlemen to handle his product. Similarly he may wish to make a large profit allowance to encourage distributors to devote more promotional efforts to his product. On the other hand, a manufacturer may be in the process of shifting his distribution channels and have a desire gradually to reduce the proportion of his goods going to a certain class of middlemen. Hence he may lower the trade discount accorded to this group.

Even if there could be shown a stronger thread of economic connection between trade discounts and sellers' costs, it is doubtful whether differences in these costs are of that tangible character envisaged by the Robinson-Patman Act as suitable justification for price differentials. A manufacturer selling part of his output to wholesalers,

part to chain stores, and part directly to independent retailers, and granting different trade discounts to each, presumably has different costs for each of these channels; but these are difficult to segregate and apportion. Sales to the chain stores may be made on an annual contract basis; and to arrange these contracts may require two weeks' time of one of the most important executives in the company. How much is the selling expense? Sales to the wholesalers and independent retailers may be made in part by the same force of salesmen, some of whom also may call occasionally on the individual stores of chains to check on the movement of the company's product. How is the salesforce pay roll and traveling expense to be allocated? Perhaps, in the future, distribution cost accounting will be improved to a point where better answers to these questions are possible; but in the past both the expense of such refinements in accounting and doubt as to the utility of the information for management purposes have been deterring factors. This constitutes an additional reason why trade discounts have exhibited a much more nearly traceable relation to buyers' costs than to sellers' costs.

The trade discount is an effective pricing device so long as a manufacturer is dealing with only two or three simple classifications of customers, each performing a substantially homogeneous group of marketing functions. But the extent of the shifts and realignments appearing in marketing functions and the consequent breakdown of many of the strictly institutional categories have created numerous situations in which segregation of customers into a few classifications for pricing purposes is not sufficient. There are too many different problems, too many different combinations of functions—perhaps for some manufacturers almost as many different combinations of functions as there are customers. Not even two large chains in the same line of business, for instance, necessarily perform the same distributive functions. One of them may receive all purchases of merchandise from manufacturers in large shipments at central warehouses where the merchandise is carried in stock for subsequent shipment to the stores; whereas the other may carry reserve stocks primarily at its stores and consequently require the manufacturer to make shipments in smaller quantities to the individual stores. Such differences in functions lead naturally to price differentials. Hence an important reason for the increase in so-called price discrimination in recent years is to be found in the difficulty of adjusting trade discount classifications to a manifold variety of combinations of marketing functions. Too many special situations have arisen which could not be fitted into a preconceived schedule of trade discounts. If in the future a manufacturer seeks to use trade discounts in place of the out-and-out varying price policy which is clearly banned by the Robinson-Patman Act, he presumably will find it desirable not to establish too elaborate a set of customer classifications, if there is any way by which it can be avoided.

But are trade discounts still permitted under the Act? This is a point on which there is difference of opinion. Trade or functional discounts are not specifically

mentioned in the Act. Therefore, some commentators have held that the situation with respect to such discounts is no different from what it was under the Clayton Act prior to the passage of the Robinson-Patman Act. Old Section 2 of the Clayton Act was silent on the matter of trade discounts. The Federal Trade Commission in the well-known case of the Mennen Company[19] ordered the latter to "*Cease and Desist* from discriminating in net selling prices, by any method or device, between purchasers of the same grade, quality or quantity of commodities, upon the basis of a classification of its customers as 'jobbers,' 'wholesalers,' or 'retailers,' or any similar classification which relates to the customers' form of organization, business policy, business methods, or to the business of the customers' membership or shareholders, in any transaction in, or directly affecting interstate commerce, in the distribution of its products. . . ." If this order had been sustained, the practice of using trade discounts would have been ended as contrary to the provisions of the Clayton Act. The Circuit Court of Appeals of the New York District reversed the Commission's order in this case,[20] but on different grounds, namely, that the practice of the Mennen Company was not unfair competition under the Clayton Act because it did not injure any competitor of the Mennen Company. The Supreme Court refused to review this decision.[21] Later, however, the Supreme Court in another case[22] essentially overruled the grounds of the lower court's decision in the *Mennen* case. In none of these decisions, however, did a court pass judgment on the specific contention of the Federal Trade Commission that trade discounts were outlawed under the Clayton Act. Therefore the use of such discounts has continued; and it is argued that the Robinson-Patman Act, since it omits any mention of trade discounts, does not alter the situation which has existed for so many years under the Clayton Act.

But there is one circumstance which casts doubt on this conclusion. The Robinson-Patman Bill as reported out of the House Judiciary Committee included the following proviso:

Provided, That nothing herein contained shall prevent or require differentials as between purchasers depending solely upon whether they purchase for resale to wholesalers, to retailers, or to consumers, or for use in further manufacture; for the purpose of such classification of customers as wholesalers or jobbers or retailers the character of the selling of the purchaser and not the buying shall determine the classification, and any purchaser who, directly or indirectly, through a subsidiary or affiliated concern or brokers, does both a wholesale and retail business shall, irrespective of quantity purchased, be classified: (1) As a wholesaler on purchases for sale to retail dealers only, not owned or controlled, directly or indirectly, by the purchaser, and (2) As a retailer on purchases for sale to consumers.

The purpose of this proviso evidently was to permit trade discounts applying to wholesalers and jobbers, but to force chains to be classified as retailers (a thoroughly

[19] F. T. C. Docket No. 606. [20] Mennen Co. v. F. T. C., 288 Fed. 774 (C. C. A. 2d, 1923).
[21] *Id., cert. denied,* 262 U. S. 759 (1923).
[22] Geo. Van Camp & Sons Co. v. American Can Co., 278 U. S. 245 (1929).

unrealistic and unsound limitation, which reveals the animus behind the whole measure) and to establish a dual classification for concerns engaged both in wholesale and in retail business. In the Act as finally passed this proviso was dropped out entirely; and one plausible view of this omission is that Congress desired to take a stand similar to that of the Federal Trade Commission in its order on the *Mennen* case and close the door entirely to price differentials based on customer classifications (unless, of course, these price differentials were of such a character as not to fall under the express prohibitions of this section of the Act, *i.e.*, not on commodities of like grade and quality; not in interstate commerce; not having the effect of substantially lessening competition, tending to create a monopoly, or injuring, destroying, or preventing competition with any person, etc.). It is of course possible that the courts in their interpretation of the Robinson-Patman Act will nevertheless "read in" permission to give trade discounts, but there seems to be little doubt that the sponsors of the measure desired to have this door closed.

If the door is closed to trade discounts as such, any price differentials as between different classes of customers, provided they fall within the purview of the Act, seemingly would have to be justified either on the basis of differences in the seller's costs or on the basis of lack of competition between the two types of customers concerned and the consequent impossibility of discrimination. As indicated in the foregoing discussion, the first of these bases is not very satisfactory, since trade or functional discounts are likely to bear so much closer relation to the buyer's costs than to the seller's costs; and in any event tangible differences are difficult to determine. The existence of competition or lack of competition is also an unsatisfactory criterion. In the first place there is the uncertainty of application. Who are competitors? Is there more, or less, competition between a retail clothing store in New York City and a retail clothing store in Philadelphia than between a wholesale grocer in New York and a retail grocer in the same city? Is a wholesale grocer in competition with a grocery chain, such as the Great Atlantic & Pacific Tea Co., which performs both wholesale and retail functions? Is a retailer of one type who handles a very small quantity of a certain product as a side line in competition with a retailer of quite another type who specializes primarily in that commodity?[28] And then there are all the situations in which a wholesaler carries on a small retail business, and those in which a retailer similarly engages in occasional wholesale transactions. Even more serious is the difficulty that in many instances a manufacturer, in order to cover his market, definitely wishes to sell to several different types of distributors who undeniably are in competition but who nevertheless perform different groups of functions and have different costs. A food manufacturer may

[28] The length to which it is possible to go in pursuit of the idea of protecting competition (really meaning thereby the protection of competitors) is illustrated by the measures proposed from time to time in state legislatures to forbid drug stores, department stores, and variety stores to operate luncheonettes. A temporary high water mark in proposals of this general type is represented by the bill introduced into the New York legislature last year providing that the handling of each classification of merchandise in a retail establishment be conducted as a wholly separate business, with a separate entrance from the street.

seek to sell not only to wholesalers but also to independent retail grocers, to chain grocery stores, to department stores, and to supermarkets. In a world in which the importance of distribution is increasing, and the shifts and changes in the grouping of marketing functions are continually producing new merchandising combinations, absence of competition is scarcely a satisfactory basis for price differentials designed to compensate for differences in distributive functions. In practice trade discounts fell far short of meeting the requirements of the situation; but even these seem to have come under the ban of the Robinson-Patman Act, unless the courts assume considerable leeway in interpretation.

So, even if there were no other grounds for dissent, the philosophy of the Robinson-Patman Act is fundamentally incompatible with a realistic functional view of the marketing process. With no denial that there have been many abuses and cases of injustice in connection with pricing policies and practices, it is still true that the complex and dynamic character of the marketing process demands many price differentials of types condemned under the Act as discriminatory, unless, indeed, we are prepared to accept the idea that competition is an out-moded principle in marketing. But if this be not the case, and yet if the social situation is deemed to be such as to warrant some general law of this type remaining on the statute books, there at least should be some express provision for price differentials based on trade or functional classifications. It may well be that the concept of unfair competition ought to be broadened, but cost is not a workable criterion from the standpoint of either economics or marketing.

If the Robinson-Patman Act is not amended, or is not considerably modified in the process of court interpretation, and if it is rigorously enforced, there will be a tendency towards decline in the number and extent of price differentials, because of the difficulty encountered in justifying them on the basis of tangible differences in accounting costs. There will probably also be some tendency towards simplification of distribution channels, probably in two directions. In the functional changes that have been taking place in the marketing field it is possible to trace two general patterns. The first of these, "manufacturer merchandising," is the situation in which a manufacturer clearly takes the product responsibility; he does the designing, trade-marks the goods, assumes the sales promotion task, exercises usually some choice over the selection of retail outlets, and probably maintains or suggests or at least advertises a resale price. The second pattern, "retailer merchandising," is the situation where a retailer takes the product responsibility; he determines what goods are to be offered; perhaps he designs them; he owns the trade-mark and undertakes the promotional task; possibly he buys the raw materials; he may even exercise virtual control over the manufacturer, or perhaps this year he contracts with one manufacturer to make the goods, next year with another. Under price control legislation of the Robinson-Patman type, changes in distribution channels are likely to result in these two patterns becoming more sharply defined. In some instances such a

simplification of distribution channels may lessen confusion. But there is a grave question whether the resulting more rigid structure of business will not prove dangerously unadaptable to both secular and cyclical changes. Particularly does this probability appear disturbing in view of the likelihood that the groups which have sponsored this legislation, still pursuing the will-o'-the-wisp of security, will in the not distant future insist on hedging about the price system with further restrictions.

APPENDIX

The social situation which gave rise to the Robinson-Patman Act is understandable. Present political realities, furthermore, make repeal or drastic modification of this Act unlikely. Consequently, with a view to the possibility of making the Act more workable and to bringing it into closer accord with economic and marketing realities, the writer, in collaboration with Professors Isaacs, Learned, and Teele of the Harvard Graduate School of Business Administration, has drafted the suggested amendments shown below. The purposes of these amendments are as follows:

(1) To make the Act approach more closely the original purpose of the Clayton Act, namely, to protect the general principle of competition.
(2) To lessen the emphasis on cost as a basic criterion of discrimination.
(3) To permit classification of customers in accordance with distributive functions performed.
(4) To drop out the criminal (Borah-Van Nuys) section, which does not belong in the Act anyway, not having been a part of the original Robinson-Patman Bill.
(5) To make good faith and absence of subterfuge the governing principle with respect to the propriety of brokerage fees, advertising allowances, and other collateral arrangements.
(6) To relieve business of the dangerously severe threats of suits for triple damages in cases where the practices complained of do not tend to monopoly.

New matter is printed in italics. Matter to be deleted is enclosed in brackets.

ROBINSON-PATMAN ACT

[Public—No. 692—74th Congress]
[H. R. 8442]

AN ACT

To amend section 2 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914, as amended (U. S. C., title 15, sec. 13), and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 2 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914, as amended (U. S. C., title 15, sec. 13), is amended to read as follows:

Sec. 2. (a) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities [of like grade and quality], where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof

or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, [and] where the effect of such discrimination may be substantially to lessen *competition, to tend to create a monopoly in any line of commerce, or substantially to disable, destroy, or prevent competition between the seller and his competitors or between and among customers of the said seller and their competitors, and either where such commodities are of like grade, quality, and quantity, or where the discrimination in price is excessive in that it is grossly out of proportion to the differences in grade, quality, or quantity put forward as the basis of such discrimination and not justified by the probable saving or other advantage to the seller resulting from differences in the grade, quality, or quantity, or method of sale or manufacture in any given case:* Provided, *That in determining quantities reference may be had to total quantities purchased during a season or other reasonable unit of time, and consideration need not be limited to single transactions.* [competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided,* That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: *Provided, however,* That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established.] *And provided further,* That nothing herein contained shall prevent *differentials that make only reasonable allowance for the different functions performed by the purchasers in commerce on behalf of the seller:* And provided further, *That nothing herein contained shall prevent* persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: *And provided further,* That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

COMMENT. The definition of the effects which a discrimination must have to render it unlawful has been redrafted to make certain that it is injury to competition, and not injury to competitors, which the law is designed to cover and to insure that the effect upon competition must be material, so that an inconsequential "injury" to competition will not suffice to sustain a complaint. The provision designating the persons between whom the affected competition shall be has been redrafted to achieve greater clarity without, it is submitted, restricting in effect the scope of the section. Instead of a proviso permitting quantity discounts where justified, the definition of a discriminatory price has been redrafted to prohibit excessive differentials in price, based not solely on differences in quantity but also on differences in grade and quality, thereby closing a door to evasion. Moreover, the justification for price differentials is made to rest not exclusively on savings in costs, which often may be not susceptible of proof, but on other advantages which the seller may be able to demonstrate results from the questioned transaction. The first proviso expressly authorizes functional discounts, an open question under the present Act that is discussed in the article to which these proposals are appended. The proviso authorizing the Federal Trade Commission to establish maximum quantity limits for price differentials is deleted on the grounds that the need for this provision has not been demonstrated and that the exercise of the power conferred by it might destroy opportunities for realizing economies of large-scale production.

(b) Upon proof being made, at any hearing on a complaint under this section, that there has been *such* discrimination in price or services or facilities furnished *as would be unlawful under this section if justification therefor were not proved,* the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however,* That [nothing herein contained shall prevent] a seller *charged with unlawful discrimination may justify his conduct* [rebutting the prima-facie case thus made] by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

COMMENT. The first change in the foregoing paragraph is for the purpose of removing any doubt that the burden of proof is on the Federal Trade Commission to show that a discrimination complained of is not merely *any* discrimination but is one which falls within the purview of the Act. The second change is for the purpose of permitting a seller to use the fact of meeting competition as a substantial defense, not merely as a means of shifting the burden of proof.

(c) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant *to any purchaser directly or indirectly,* or *for any purchaser directly or indirectly* to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except *it be in good faith for services actually rendered.* [for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.]

COMMENT. The changes in this paragraph are partly for the purpose of clarification and partly for the purpose of broadening the scope of "services actually rendered" and at the same time introducing good faith or absence of subterfuge as a criterion of judgment.

(d) That it shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is *made in good faith for services actually rendered or facilities actually furnished.* [available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.]

COMMENT. The purpose of the change in this paragraph is to substitute the test of services actually rendered in good faith for the ambiguous and unrealistic test of "proportionally equal terms."

(e) That it shall be unlawful for any person to *make indirectly such discriminations as are forbidden in Sec. 2. (a)* [discriminate] in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased; *and that where such services and facilities are not made available on request to all purchasers in reasonable proportion to the quantities purchased by them, the burden of proof shall be on the seller to show that there has not been indirectly a discrimination within the meaning of Sec. 2 (a).* [upon terms not accorded to all purchasers on proportionally equal terms.]

COMMENT. Changes are made in this paragraph for the purpose of reinforcing the prohibition against indirect discrimination and of making the defenses in the case of such alleged discrimination the same as those provided in Section 2 (a), at the same time making absence of reasonable proportion to the quantities purchased a basis of placing the burden of proof on the seller.

(f) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section.

Sec. 2. (This section provides that the Act shall not affect actions taken or pending under Section 2 of the Clayton Act. However, a proviso, drawn with a view to the *Goodyear* case, authorizes the Commission to reopen proceedings where it had issued cease and desist orders and to issue supplementary complaints charging violations of Section 2 as amended where it believes such to have taken place since the effective date of the amendments. No change in this section is proposed.)

[Sec. 3. It shall be unlawful for any person engaged in commerce, in the course of such commerce, to be a party to, or assist in, any transaction of sale, or contract to sell, which discriminates to his knowledge against competitors of the purchaser, in that, any discount, rebate, allowance, or advertising service charge is granted to the purchaser over and above any discount, rebate, allowance, or advertising service charge available at the time of such transaction to said competitors in respect of a sale of goods of like grade, quality, and quantity; to sell, or contract to sell, goods in any part of the United States at prices lower than those exacted by said person elsewhere in the United States for the purpose of destroying competition, or eliminating a competitor in such part of the United States; or, to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor.

Any person violating any of the provisions of this section shall, upon conviction thereof, be fined not more than $5,000 or imprisoned not more than one year, or both.]

Sec. 4. Nothing in this Act shall prevent a co-operative association from returning to its members, *whether they be* producers, *merchants,* or consumers the whole, or any part of, the net earnings or surplus resulting from its trading operations, in proportion to their purchases or sales from, to or through the association.

COMMENT. The change here is for the purpose of permitting cooperative associations of merchants to enjoy equal status with cooperative associations of producers or consumers with respect to any exemptions under the Act.

CLAYTON ACT

Sec. 4. Violation of Antitrust Laws—Damages to Persons Injured. That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee: Provided, however, *That only compensatory damages shall be allowed for violation of Sec. 2 as amended where such violation does not tend to create a monopoly in any line of commerce or substantially lessen competition:* And provided further, *That such compensatory damages shall, in the absence of proved loss of profits or other proved substantial damages, be calculated to be the amount of the proved discrimination against the injured party.*

COMMENT. A change has been made in this section, first, for the purpose of removing the threat of triple damage suits under the Robinson-Patman Act and, second, to provide a basis for the calculation of compensatory damages in the event of inability to prove to the satisfaction of the court loss of profits or other substantial damages.

THE EFFECT OF PRICE CONTROLS ON NON-PRICE COMPETITION

WROE ALDERSON*

It has been said that the National Recovery Administration operated under a law which gave it legislative, executive, and judicial functions. But in retrospect it seems to have scarcely passed beyond the legislative phase in most of the matters which came under its jurisdiction. The essential part of its record for the economist is the record of the attempts to formulate policy in connection with the code-making process. The NRA, which might have assumed historic importance as an effort to operate under a new national economic policy, in practical effect resolved itself into a great national forum for the discussion of the elements of such a policy.

Questions of price control brought many divergent viewpoints into the national forum. Economists were in general opposed to such measures. Business men were much more divided in their opinions. But among these who favored some form of price control there were large firms and small firms, advertisers and non-advertisers, profitable and unprofitable concerns, manufacturers, wholesalers, and retailers. In short it could not be said that business men of this persuasion conformed to any particular type.

Arguments offered in favor of price control measures were of similar scope and variety. Very frequently their logic rested more on social grounds than on economic. An argument to which a number of economists listened with some sympathy was the plea for the preservation of the small enterprise as a means of giving fuller opportunities to individual initiative. An attempt was sometimes made to give this view a more acceptable economic flavor by insisting on the essential nature of the services performed by some of the firms which were on the verge of business failure. If these firms were not permitted to survive, it was argued, great social costs might be incurred in replacing them.

Similarly in the raw materials industries, such as coal and petroleum, the demand for price control was frequently linked with the need for conserving natural resources. Both types of arguments stressed structural features of economic life. Thus they created resistance and uneasiness in the minds of economists who preferred to

* Division of Commercial Research, Advertising Department, The Curtis Publishing Company, Philadelphia, Pa. Formerly economist on the staff of the National Recovery Administration. Contributor to periodicals of articles on problems in the field of marketing.

test all control measures by the principle of competitive equilibrium. For them a measure was a bad measure if it seemed to create inelasticity by restricting competition. In recognizing the plea for the small enterprise or for the conservation of natural resources they felt that they were practical men, making concessions which could not be defended on wholly economic grounds.

Two approaches might have been taken in examining price control measures with relation to the maintenance of competition. The first, an attempt to show that the proposed form of control did not actually interfere with price flexibility, was explored at some length in a number of code discussions. Particularly with regard to arrangements allowing for minimum mark-ups to cover such functions as wholesaling and retailing and provisions designed to eliminate price discrimination, it was argued that the basic price level would still move up and down as freely as before. Such pleas were often presented on behalf of business groups by recognized economists, and sometimes admitted for code-making purposes by equally eminent economists engaged in advising the administration. Statistical price studies made subsequently at several universities have contributed something to the substantiation of this view.

But the other approach to a consideration of the effect of price control measures received no clear statement during the NRA period. That approach is to analyze the effect of price control on non-price forms of competition. Business men were struggling for an enunciation of such a viewpoint in their discussions of destructive price-cutting. The term "destructive price-cutting" was never given a clear-cut definition either by business men or administrative officials. But if non-price competition is given a place of equal importance with price competition, destructive price-cutting may be defined as that which destroys or seriously restricts non-price forms of competition.

The four major factors in non-price competition are held to be:

(a) Improvement in quality and service.
(b) Differentiation of product.
(c) Consumer advertising.
(d) Trade promotion.

Of these four the first is most basic. It is practically always present as an element in competition parallel to price competition, particularly in fabricated products. One recent writer[1] states the view that the pressure of competition upward on quality is equally significant with the pressure of competition downward upon price. To some economists the emphasis upon competition in quality lies in the direction of semi-monopoly and is likely to interfere with the attainment of competitive equilibrium.[1] To the present writer it seems doubtful whether under our present form of industrial organization a true competitive equilibrium can be attained at all unless quality competition and price competition are equally vigorous. The full employment of

[1] Montgomery, *The Consumer Looks at Distribution* (Jan. 1937) J. of Marketing.

productive resources depends on the quality of the product turned out as well as upon the number of units produced. Full employment of resources does not occur until an industry is making the best quality of product that the market will absorb in the greatest number that the market will absorb. In theory, at least, there should be a price for each type of product which will bring about this balance between quality and number of units.

Further significance can then be offered for the term "destructive price cutting" which is so frequently heard in trade circles. It would mean the establishment of prices so low as to discourage the full employment of the industry's resources by necessitating cuts in the quality of the product offered. There might be some instances in which a definitely fixed price would be justifiable in these terms. In other words there might be products on which the definite fixing of the price would cause competition in quality to raise the actual value of the product up to a point that would justify that price. Such an argument would of course have to contemplate a degree of economic wisdom on the part of the agency fixing the price which is not always possessed either by public price-fixing bodies or by individual concerns in setting a price on their products.

But purely for purposes of analysis it may be worthwhile to assume for a moment that such a price has been fixed on a given product and to consider the various competitive devices which would tend to raise the marginal costs of the product to the level of the price so fixed. Improving the quality of the product has already been mentioned, but let us suppose that possible improvements in the product itself had been exhausted long before the level of the fixed price had been reached.

The next factor which would probably come into play would be the offering of various services accompanying the product. This might take the form of installation service or guarantees of quality in the case of durable products, or palatial retail establishments and liberal credit and delivery policies in the case of consumer goods. Both classes of service have in fact been widely offered. But let us further assume that all avenues had been exhausted for elaborating either the quality or the service features of the transaction.

The next type of non-price competition which is likely to be adopted lies in the direction of product differentiation. Product differentiation has been discussed by Chamberlin[2] and others as a semi-monopolistic attempt to escape from price competition. The alternative view is offered here that product differentiation may be looked upon as an attempt to extend quality competition. Suppose, for example, that the basic quality dimension of the product is durability. In a given case the possibility of rendering the product more durable may have been exhausted before costs have been raised to the fixed price of the product. Also it may be that, after that point has been reached, the customers for the product may be considered to be divided into groups according to their interest in other quality dimensions such as

[2] See CHAMBERLIN, THE THEORY OF MONOPOLISTIC COMPETITION (1933) c. IV.

appearance and convenience in use. Additional increases in quality might then occur but with a different phase being stressed in each of the several groups. It might be assumed that the result of competition would then be to close the gap remaining between cost and the fixed price by making equivalent additions to value along different quality dimensions rather than making identical improvements along the same quality dimension.

Under this analysis product differentiation would not move away from competition but would be one means of maximizing the supply of equivalent utilities offered in the product at the fixed price. The final competitive means of raising cost to the fixed price would lie in increasing expenditures for sales promotion. Sales costs are the most elastic elements in costs. Since sales costs are subject to operating decisions in the most competitive of industries, economists have experienced difficulty in relating sales costs to the standard analysis of the competitive equilibrium. In relation to the hypothetical example in which the sales price is assumed to be fixed, the flexibility of sales costs is the final element necessary to the attainment of equilibrium in non-price competition. Such an increase in sales cost should not be considered as wholly lacking in social utility. Every improvement in quality and every product differentiation will require additional selling effort to acquaint the consumer with such improvements. The new aspect of quality will not prove wholly effective in use without consumer understanding of its advantages. On the other hand, it is difficult to increase sales costs beyond the minimum required by the routine movement of goods without something special of a quality nature to be sold.

It is probable then that neither of the two basic elements in non-price competition would ever be wholly lacking. That is to say that the increase in cost upward toward the fixed price would always combine the two elements of quality improvement and additional sales costs in some proportion. Whether the actual increase in the utility offered to the consumer would be in proportion to the increase in the price will not be considered in detail here.

There would always be additional factors beyond those which have been suggested bearing on the question of how much real utility would be given at the fixed price. In the first place the question is scarcely capable of solution in exact mathematical terms when several dissimilar quality dimensions are involved in the same cost-raising process. Another factor is the effect on the price of labor and raw materials entering into the product which would result from quality competition and tend to diminish the value which the consumer would receive at the fixed price. It would, however, have the social value of increasing the disbursements of purchasing power to labor and raw material suppliers. Counterbalancing this tendency would be the elimination of marginal firms by quality competition resulting in a higher average efficiency among the remaining suppliers, and presumably a greater ablity to provide quality in the product.

The increase in the cost of selling has been treated so far as a single element. It

may now be considered in terms of its two major components, namely the consumer education usually carried on by means of advertising and the trade cooperation which the manufacturer seeks to obtain by means of the margins which he allows to retailers and wholesalers. The manufacturer's use of these two forms of sales effort will differ in any number of respects in accordance with the types of price control which are in effect.

The remainder of the discussion can best be developed in terms of the probable effect on these two elements of sales costs of the various price control situations which may arise under recent legislation, namely the Robinson-Patman Act and the state "fair trade" laws. Three control situations will be considered for the purpose of analysis although there are many other variations which may arise in practice. These three situations may be designated as Situations A, B, and C, as follows:

Situation A—Strict enforcement of the Robinson-Patman Act but general tendency of manufacturers not to issue contracts under the "fair trade" laws.

Situation B—General use of resale price contracts establishing margins satisfactory to the retailer with the Robinson-Patman Act permitted to become a dead letter.

Situation C—Full use of both forms of control.

In the first instance where prices were controlled at the top but not at the bottom the tendency would be both to equalize competition among retailers and at the same time to intensify it. Strict enforcement of the Robinson-Patman Act would mean the elimination of any discriminatory advantage in buying which may have been available to the larger retail organizations. Such concerns, in order to hold their position in the market, would use all of the competitive devices available to them in attempting to maintain retail volume. Price competition would continue in undiminished force but quality and service features would also receive increasing emphasis. The small retailer would be enabled to meet the price competition of the larger organization and the larger organization would be obliged to meet the quality and service competition of the independent retailer.

Under Situation B, with prices controlled at the bottom but open at the top, price competition between retailers would be restricted without an equalization of competitive advantages on the buying side. The probable result would be a marked increase in quality and service elements in the competitive efforts of the large retail organizations. But it is likely that only a minor part of the new service elements to be introduced would take the form of service to the consumer. The power to demand price concessions from the manufacturer has been associated in the past with the capacity to offer special services to the manufacturer. In other words, the retailer normally offers to take over certain sales and promotion functions, which the manufacturer might perform in other cases, in return for the special price concessions. Such concessions would no doubt tend to be increased, with an increasing portion of the manufacturer's budget for advertising and promotion expended in the form of concessions to retail organizations who undertook to promote his product for him.

Under Situation C, with control of price both at the top and the bottom, the tendency would be to equalize competition among retailers and at the same time center the resulting competition upon quality and service features. While price appeal might remain as an element of retail merchandising in such aspects as odd cent pricing and occasional special sales, the ability of one section of the retail trade to profit at the expense of another by means of loss-leader selling would practically disappear. The large retail organization would lose both the special price concessions which make it easier to create price reductions and the privilege of accepting margins lower than the minimums satisfactory to other retailers. Expensive store atmosphere and elaborate consumer service would no doubt be expanded presently by the larger retail organizations.

In assaying the comparative effect of these three situations upon the manufacturer's use of consumer advertising, it is necessary to take account of two aspects of the manufacturer's advertising policy. The first aspect may be called the strategic aspect. This term is meant to characterize the considerations governing the manufacturer's choice between methods of sales promotion. The effect of a control situation on the strategic aspect of advertising policy would be to increase or decrease the manufacturer's desire to use advertising in contrast with other methods.

The second aspect of policy may be called the budgetary aspect. The effect of a control situation on the budgetary aspect is to increase or decrease the amount of funds which the manufacturer has available for use in such promotional efforts as advertising.

The probable effect of the three price control situations on advertising expenditures may now be described in terms of these two phases of advertising policy.

Situation A (prices controlled at the top and open at the bottom) would be favorable to an increase in advertising expenditures for both strategic and budgetary reasons. On the strategic side the manufacturer would now lack the special efforts which large retailers had made in return for price concessions and at the same time would need to overcome any trade resistance arising from the unrestricted price cutting to which his product might be subjected. On the budgetary side large amounts of money would be made available for advertising use by wiping out the special arrangements that may previously have existed with large retailers. In this connection it must be remembered that the Robinson-Patman Act proceeds in two major directions. The first is the elimination of discrimination by requiring that quantity discount schedules be related to relative costs of serving different customers. The second is by directly limiting the use of such promotional devices as advertising allowances and payments to retailers for demonstrators.

While Situation A is the most favorable of the three to increased advertising expenditures, Situation B (prices controlled at the bottom and open at the top) would be the least favorable. In this case both strategic and budgetary considerations would weigh against the use of advertising. This situation would give the large

retailer a preponderant place in the control of distribution so that the manufacturer's efforts would be directed even more than before toward cultivating the good-will of such leading retail organizations. The budget available for advertising would be decreased by diversion both to the protected margins granted to all retailers and the promotional allowances granted to the larger organizations.

The effect of Situation C (prices controlled at both top and bottom) would be moderately favorable to the increase of advertising expenditures, particularly in the more selective advertising media. Strategic considerations would be favorable to advertising and budgetary considerations moderately unfavorable. With the equalization of competition in the retail field and the better retail relations resulting from protected margins, a greater number of manufacturers than ever before would find the situation favorable to putting most of their sales promotion effort into advertising.

On the other hand, the granting of protected margins to the retailer would tend to decrease the advertising budget of some of the manufacturers who had previously been advertising. Such decreases would probably more than offset the savings which they effected by withdrawing promotional allowances to retail organizations. Manufacturers would then be confronted with the need for getting increased advertising effectiveness out of their advertising expenditure because of some decrease in price flexibility resulting from protected margins for the retailer. Generally speaking they would have to obtain this increased advertising effectiveness on the same or somewhat decreased advertising budgets. The apparent result would be to cause manufacturers to examine the character of their advertising expenditures more closely than ever before and to make very rigorous selection of advertising media. More complete data would be demanded from all advertising media as to the character of the markets they reach and more detailed facts supporting their claims for advertising effectiveness. Thus the price control situation, while creating a more secure place for quality competition in the product itself, would at the same time intensify quality competition among the advertising media through which the product was to be merchandised.

Other types of legislation for the control of distribution are under consideration. Any type that will be introduced will change the control situation and call for a modification of the analysis of the results. One such possibility is further government control of quality in certain fields such as the proposed revision of the Food and Drugs Act. Various measures for the control of quality will react in various ways on both quality competition and price competition. Perhaps the one clear conclusion that may be drawn from this attempt to analyze the effect of price control on non-price competition is the need for *paying attention* to the total situation. That is to say that it is not feasible to consider separately the possible effect of such measures as the Robinson-Patman Act or the state "fair trade" laws. The probable result must be considered in terms of the combination of control measures which are actually effective at a given time.

THE FICTION OF THE QUOTED PRICE

Irene Till*

Legislation to the end of controlling price competition has been directed both to the wholesale price and the retail price. In each instance the purpose has been to mitigate the ferocity of competition by narrowing the range of prices at which goods will sell. The basic assumption of the Robinson-Patman Act is that the deprivation of large concessions to big buyers will tend to an equalization of prices between them and "independents." The "fair trade" acts of states have sought to achieve that equalization directly with respect to branded goods; manufacturers are empowered to fix the prices at which their goods are sold by the jobber to the retailer and by the retailer to the consumer. In large part the effectiveness of such legislation depends upon the significance of the pecuniary quotation in the sale. This in turn prompts an inquiry into the nature of that economic fiction—the quoted price.

The quoted price wears the air of pecuniary exactitude. It is the sum paid for a haircut, a radio, a ham sandwich or a suit of clothes. The seller offers his ware at a price commensurate with the recovery of his costs and a profit or at a price necessary to meet competition. The prospective purchaser has the privilege of indulgence or restraint; he can buy or do without. But if he yields to the temptation, his acquisition can be made only at the specific price quoted by the seller. Thus, in theory, the charge for the commodity is clearly and pointedly stated; and the exchange, if it occurs, is consummated at the quoted price.

A variety of instrumentalities are used to make prices public. The price tag on a hat in a store window or the pasteboard carrying the price of a shelf of canned pineapple is simple and direct. The daily newspaper prints the current quotation of wheat on the exchange or the common stock of a railroad. Special sales of goods are brought to the attention of the consumer through free circulars, newspaper announcements, and invitations to preferred customers. The mail order house publishes at regular intervals catalogs which are both an advertisement of its wares and a vehicle for publicizing price. The radio administers homeopathic doses of "education" by special pleaders of industry. A telephone call will elicit information

* B.A., 1928, Syracuse University; M.A., 1929, Radcliffe College; graduate work for Ph.D. degree at Columbia. Member of staff of Cabinet Committee on Price Policy for formulation of government policy in industrial regulation. Author, *The Price of Gasoline* and *The Politics of the Milk Industry;* collaborator with W. H. Hamilton in *The Cost Formula for Price.*

This article is a section of the summary of a book on prices containing analyses of the structure of selected industries to be published this fall.

on refrigerators, building lots or life insurance; and call down upon the victim a corps of salesmen armed with good nature, persistence and a fluency on price. The price of things is of absorbing moment to those who have—and have not—the wherewithal to buy; and the amenities of social gossip provide a powerful medium for the spread of information. Everywhere the public is made sensitive to the particular prices of particular sellers.

These quoted prices are generally viewed as actual prices. This assumption is fundamental to much of the statistical work on price. The pecuniary quotations are frequently the only data easily available and, in providing a single index of measurement and comparison, are particularly well adapted to statistical analysis. In consequence, the quoted price is the basic material for the bulk of the tables, curves and charts of commodity prices. It has also been used for statistical compilations of a more general significance—price trends, the rise or decline of competition, and changes in the cost of living.

Yet the quoted price is often hypothetical and unreal. Numerous arrangements in the industry may relate to price but lie outside of its explicit manifestation. Nevertheless these terms have immediate reverberations upon actual price though the quoted price goes unchanged. They may be the incidence of an impetuous and uncontrolled competition; the price structure is preserved on the surface though in reality broken down through under-cover concessions. Or they may be the result of colloquial trade practice. An industry may, through sheer custom and convention, publish prices upon which deductions are regularly made or further increments of charges are added. In this manner an apparent rigidity and fixity of the price structure, as revealed in the pecuniary quotation, may cloak a constant change in price in other terms of the bargain.

The devices by which the quoted price is translated into a fiction vary from industry to industry. The size or weight of the commodity may be changed. The nickel price for a bar of chocolate has remained static through prosperity, depression and a business upturn. The accommodation to changing cost conditions has been made in size and its least visible dimension—the thickness of the bar. A loaf of bread may, so far as the eye is concerned, remain identical for several months; yet slight shavings or additions in weight have the effect of making price a variable. Clothing sizes in the cheaper price lines frequently run smaller than for more costly garments; and additional economies in material are won at the expense of inadequate seams and scanty hems.

Where goods are purchased per unit, size variations among units occasion differences in price. Ordinarily oranges and eggs are roughly sorted according to size; yet there is not complete identity of unit selling at a given price. Gradations in thickness of skin and shell make comparison difficult. Where goods themselves are so miscellaneous, each transaction is unique with its own price. Or custom may permit the inclusion of certain elements in weight which give to it something of a

fictitious character. Meats, for example, are ordinarily weighed before the bone is removed. The effect is to make price higher than the pecuniary quotation per pound. In some cases a measurement by volume is misleading. In the purchase of antiseptics the degree of concentration is of equal importance; the strength of the solution must be correlated with physical size in a judgment of price.

Even where commodities can be compared, accuracy in weights and measures is still occasionally encountered and error is not unknown. A lubricating oil survey by the American Automobile Association in 1934 indicated a rather considerable variation in pragmatic notions of a quart among gasoline service stations. But many articles are sold in package form giving no indication of quantity or weight. Minute changes in sizing constantly go on unperceived by the customer; and the uniformity of price gives him the illusion of making an identical purchase. Even where weights are designated, only the most "class-conscious consumer" takes the trouble of comparing the several brands to equate stated weight with price. If he is not a sworn devotee of an advertised brand, he may rely upon a casual glance to select the product which gives the most for the money. Many companies make use of odd-shaped containers to give the appearance of greater stature. Wine and liqueur bottles are notorious for this visual deception; long necks and concave bottoms not only appeal for their eccentricity; they give the illusion of greater volume. Some deceptions are more obvious. The box of stationery turns out to have a false bottom; the large box of tooth paste yields an under-sized tube; the bargain in canned peas is discovered to be water. More ingenious is "balloon bread" sold in some cities. Its printed weight is identical with that of smaller loaves; yet its "puffed-up" size gives it an immediate appeal to consumers who must pinch their pennies in the purchase of necessities.

The miscellany of size also adds confusion. The face lotion counter of a five-and-ten turned up the following: a 2 ounce jar selling for $.35; two $.25 brands, one containing 1.1 ounces and the other unindicated; two $.20 brands, one containing 3 ounces and another unspecified; eight $.10 offerings of which two contained 4 ounces, two were 2 ounces, two more were 7/8 and 5/8 ounces respectively, another carried no indication and the eighth was 4½ fluid drams. A chain grocery marketed canned peas at a variety of sizes and prices. One size—1 lb. 4 oz.—sold at three prices; $.19, $.14, and $.10. A 1 lb. 1 oz. can sold at $.17; the 1 lb. sizes sold two for $.25 and two for $.35; and an 11 oz. and 10½ oz. can cost $.12 and $.08. Here the multiplication of items makes difficult the application of a criterion of judgment.

Nor is the identity of the commodity proof against the shock of the market. Shoe manufacturers construct their product to retail at particular prices—$2.95, $3.95, $5.85, $12.50. Women's dresses are marketed at distinct price lines—$6.75, $10.75, $16.95, $19.75, $22.50. These price categories may remain relatively unchanged for months or even years. In this instance costs are adapted to allow marketing at these prices. The quality of the materials, the processes used, and the care in workman-

ship are selected in terms of the price at which the good is to be sold. The maintenance of a uniform price is at the cost of basic changes in the commodity.

In time these changes may so alter its character that it is a new product. A price curve of women's stockings, a railroad trip, or a permanent wave over a twenty year period incorporates a number of different commodities. The generic name remains the same; the pecuniary quotations are comparable; it is the thing which has changed. The technological improvements in the automobile make price comparisons of 1917 and 1937 models meaningless. Radical changes in style have similar consequences. By a series of adaptations masculine underwear was shortened from ankle to knee length and then was later abbreviated into the "short." Women's "intimate" garments have been equally revolutionized. An index of the prices of "slips" over four or five decades would have little purpose; the materials, the design and even the function has undergone change.

A quoted price presumes a distinct quality. One copy of *Gone with the Wind* is substantially like another; though even here some buyers draw sharp distinctions between a first and a later edition. A half dozen packages of Camel cigarettes are virtually identical—at least for short intervals. In such cases the ware of trade can be clearly identified, and prices can be compared. But a quoted price for books, cigarettes, automobiles or medical service has less meaning. The individual commodities are so dissimilar that the generic term gives little indication of the ware. In consequence, it is difficult to correlate quality with price. A popular novel cannot be compared with *The American Language;* nor is a current Ford strictly comparable with a Plymouth or a Chevrolet although they are in the same price range. Thus the consumer is faced with a number of unique items selling at separate prices.

The quoted price must effect a compromise between quality and its explicit recognition in the market. "Consumer acceptance" is a powerful determinant of the price at which a good can be sold; and this is a product of advertising rather than of difference in quality. In New York City, for example, all Grade B pasteurized milk must meet the same farm inspection requirements and city regulations. The result is a virtually identical product. Nevertheless a slight differential prevails between advertised and unadvertised brands; and recently won the approval of the United States Supreme Court in the name of competition.[1] According to the Federal Trade Commission, there was no superiority of the advertised Goodyear tire over the All-State brand manufactured by the same company for Sears Roebuck. Nevertheless the private brand customarily sold at a 25% differential below the acknowledged Goodyear product. Popular prejudices are also important in the pricing process. In the North dyed oranges command a better price because their artificial color connotes ripeness. In New York City white eggs are regarded as superior to brown eggs; and in New England the opposite notion has currency. Price differentials vary accordingly. Here a hypothetical superiority gets itself expressed in the quotation and further widens the gulf between quality and price.

[1] Borden's Farm Products Co. v. Ten Eyck, 297 U. S. 251 (1936).

The word "quality" is itself a name for a miscellany of particulars. The things that are wanted from a commodity are often numerous and conflicting; and the emphasis by consumers falls at different points along the scale. The automobile must conform to current notions of style and beauty; it must have comfort; it must lend prestige; it must give transportation service; it must be relatively economical to operate. Automobile manufacturers have to strike a balance among these different and even contradictory wants to secure the largest number of sales. Even a simple item like silk stockings presents a study in opposition. Here is a woman who wants sheerness; here is another who wants durability. The majority want something of both plus satisfactory fit and the latest in spring shades. The result is that a standard of superiority is not easily applicable in the market. Theoretically, a high grade shoe is one of good leather and careful workmanship. But a style shoe, largely of paper construction, may—if the price is low enough—be preferable; wearing quality is less important than suitability to an ephemeral costume. This practical necessity for an individual arbitration of contradictory wants gives to each commodity a distinctive grade and a distinctive price.

Moreover, most grades which are established are based upon physical measurements. Yet the important test is the commodity in use. Here the quoted price is frequently the only unifying element in an assortment of heterogeneity. A 60 octane gasoline in a five year old automobile and the latest model is chemically identical; but the results obtained from the fuel will be quite different. The older car can give satisfactory service on this low octane; for an equivalent performance in the newer vehicle a higher octane is necessary. The pecuniary identity of the transaction does not coincide with the actual use of the good. Nor do standard units from an assembly line give anything like uniform service. Refrigerators, typewriters, radios show a wide variability in performance. One domestic oil burner will operate for years within a minimum of care and repairs; another through some obscure defect in its collection of parts will require constant attention. Recurrent breakdowns and the costs of repair cannot be taken into account in the quoted price. But they make for wide differences in the actual prices of goods.

In any purchase there are a variety of terms which vitally affect price but are not caught up in the pecuniary transaction. Most obvious is the discount. Correspondence schools sometimes use the quoted price as a mere bid for business without any expectation that their goods will find a market at that price. The first letter carries the preliminary asking price; the follow-up offers the special inducement of a lower rate for a limited period. This quotation may be 30% or 40% less than the original price. If this appeal also goes unheeded, another discount may be offered to secure missionaries in that "territory." Some hat stores in New York City use the quoted price as the point of departure for bargaining. A conference customarily follows with the buyer as to what she is willing to pay; and the sale is effected by splitting the difference. In industries that are very competitive, a legiti-

mate discount for volume may turn into a price-cutting device. Gasoline service stations have engaged in the practice of granting "courtesy cards" to customers whose volume is particularly attractive. Later they are mailed to everyone in the telephone directory. During the early 'thirties when the tire market was demoralized, tire dealers regularly sold at the quoted price minus the discount necessary to secure the business. In return they recouped from manufacturers whose "net billing list" became a maze of concessions—discounts for volume, discounts for cash, discounts for special sales, discounts to meet competition. As many as ten discounts were constructed upon a single tire. The quoted price was a fiction through the whole industry from manufacturer to consumer.

A quotation may represent a cash price or a credit price. The purchaser of electricity secures the ware for cash only; if his monthly bill is not settled within a short period—usually twenty days—he incurs a "surcharge." The acquisition of a diamond ring or a suit of furniture "on time" is generally accompanied by an interest charge. For other products the price normally quoted includes as one of its items the cost of carrying accounts; and the payment of cash yields some concessions. The buyer of a second-hand piano or automobile may secure large deductions on the quoted price if he can flourish cash or check-book. Real estate prospects fall into two distinct categories—those who can make a heavy down payment and those who wish to amortize over a long period. The method of payment may make a sizeable difference in the prices quoted.

In some instances the quoted price represents both the cash and the credit price. The fees for a university education are the same whether the buyer pays at once or spreads the payments over or beyond the semester. A visit to the dentist or a few hours' shopping in a department store can be squared at the end of the day, the month or six months; and the cost of the goods remains identical. Local grocery stores have been known to extend credit for years; the treatment of such customers may be less civil; but in the end they pay no more than the cash customers. Here the quoted price cloaks a diversified service to customers. Some are simply buying a good; others are buying the use of money as well as the commodity. The credit charge is hidden in a general price, and all buyers are taxed whether or not they make use of the privilege.

Dividends are also an instrument for modifying the quoted price. The co-operative assesses the full market price and then returns a part at the end of the year. The precise deduction on a commodity cannot be calculated since dividends are usually dispensed on the basis of dollar volume after all expenses for doing business have been subtracted. Some gasoline cooperatives may make their differentials explicit—perhaps two cents on the posted price—though this too is paid in a lump sum when the calendar year has ended. A "D.A." account at Macy's entitles the shopper to a percentage dividend on total purchases. The dividend has two distinct advantages. It lends to the company the air of maintaining a price structure

since its prices compare with those of competitors. It also brings a regular trade to the store by those buyers who are sensitive to the fictitious character of the quoted price.

A premium represents an added value over and above the pecuniary exaction for a good. A year's subscription to a Washington newspaper carries with it the gift of a set of "Dickens' Works." The collection of enough certificates with the purchase of cigars or cigarettes entitles one eventually to a cowboy suit, a brooch or a set of dishes. A large drug chain is currently offering "this amazingly simple 'Put-A-Penny' Plan"; with every $.15 purchase the customer receives a coupon; the requisite number of these plus pennies will yield a set of plated silverware. Frequently commodities are combined and offered at a price below the sum of the quoted prices for each. Sears Roebuck is said to have initiated the practice of selling tires in pairs and accompanying the purchase with a free tube. It is a common practice to combine magazines and sell subscriptions at a special rate. Razor blades are frequently offered in conjunction with a holder; these combinations may be sold at a loss in the expectation of recouping on future sales of blades. It is difficult to assess the value of these bargains since the goods are sometimes manufactured especially for sales purposes and are not in quality comparable with the regular brand. Their pecuniary worth is reckoned rather differently by the store and the consumer. One thinks in terms of wholesale prices; the other in terms of the prices charged for the commodity in another retail store. In consequence, a premium may constitute for the ultimate purchaser a rather considerable deduction on the quoted price.

A guaranty is an indirect way of varying the price of a commodity. A popular brand of refrigerator carries "unconditional" protection for a year and a five year warranty on the mechanism for ice-making. Another advertises a one and ten year combination; but the guaranty covers replacement only of certain parts—frequently those least likely to break. A used refrigerator, selling very cheaply, may carry no guaranty at all. Packard automobiles in the $3000 class carry a servicing arrangement which is not available in the purchase of ordinary cars. For a year after the sale the dealer is pledged to make free replacements of particular parts specified in the contract. This service, incidentally, constitutes a deduction on the dealer's commission for the sale. Thus there are great gradations in the risk shared by buyer and seller. It is possible to calculate the average costs for servicing a commodity under a guaranty; yet the individual cost may be quite variable. The result is a multiple price structure for supposedly identical units selling at a single price.

Another important term in the bargain is the privilege of returning unwanted articles. The woman shopper who finds that a newly acquired article of apparel clashes with her wardrobe may incur a total loss on the purchase if she cannot return it. The practices of sellers on "returns" is very unstandardized. One portrait painter who finds his ware unacceptable to his patron will nevertheless charge his full price; another will refuse to make the sale and will take the loss himself. Some shops

will allow returns within a few days and give cash. Others will give only a refund slip despite the cash preference of the customer. Still others make concessions merely to credit customers—sometimes only on the threat of a refusal to pay the bill. The cost of returns frequently involves more than the original price of the commodity; the time and irritation in effecting an unwilling adjustment cannot be measured in pecuniary terms.

Price deductions are granted through trade-in allowances on used goods. The usage originated on goods which still possessed utility but—due to mechanical or style obsolescence—had become unsatisfactory and were turned in for a new product. The automobile is the classic example. For the majority of buyers today the cost of a new automobile is not the quoted price but the f.o.b. Detroit price plus a succession of charges and minus the excess allowance on the old car. Consumers have been known to enter the market and purchase pieces of automotive junk simply for trading purposes. There are even cases in which dealers have presented ancient hacks to customers and then bought them back through a trade-in concession. Radio stores offer a $25 allowance on a used radio—sight unseen—in the purchase of a new $80 model. Tire competition is so keen that casings, shorn of rubber and fit only for the junk market, are fiercely bid for among sellers to the end of effecting a sale of a new tire. This form of price-cutting is almost impossible to control. Trade-in allowances cannot be fixed by year and model to give fairness to all customers; age is not an adequate criterion of the condition of the ware. Yet uncontrolled they become an instrument for vicious and under-cover demoralization of the price structure.

Prices can also be manipulated through changing the classifications of goods or customers. Some commodities, such as fertilizer and paper, contain an infinitude of grades; it is easy for the seller to shift a quotation to another grade in the cause of special customer satisfaction and future contracts. Another device is to give the semblance of difference, thus requiring a special quotation. In some cities pasteurized milk in an ordinary bottle commands one price; the same commodity in a fancy bottle with a fancy name is sold at a differential. Where the commodity is built to order, goods cannot be thrown into grades; and the complex structure of prices may cloak price concessions to particular customers. The services of a physician, for example, cannot be classified for rate purposes. The $3.00 office fee covers a commodity unique for each customer; and, moreover, many physicians consciously suit their charges to what the traffic will bear.

A multiple classification of customers has the same effect. An NRA study of open price filing in the electrical manufacturing industry disclosed a hierarchy of industrial accounts. The prices in vogue had grown out of individual bargaining with each customer; a difficult prospect had been won by creating a new customer class or redefining an old one in such a way as to give him a better price. Here was a quoted price which served as a base for various differential discounts computed according to a complex stratification of customers. The significant changes in price

occurred not in the pecuniary quotation but in a revision of accounts. The electrical power industry engages in similar practices. Here the fundamental division is between domestic and commercial consumers; but there are an infinitude of subdivisions within these categories. Rural and city consumers may pay different rates; and frequently there is a further classification based on the number of electrical applicances used. Power for lighting is subject to one rate; the ownership of a refrigerator entitles one to another; the possession of a range or water heater evokes still different rates. Prices charged large consumers—stores, factories, public authorities—are even more heterogeneous. In this case the quoted price is merely a hypothetical norm upon which is strung a majority of exceptions.

A quoted price may or may not include transportation. During the war and up until 1928 newsprint prices were quoted f.o.b. mill; the publisher paid the freight. Prices subsequently fell—and fell more than the difference indicated in the quoted prices. Quotations were now for delivery—whether to New York, Dallas or San Francisco. Since the paper company absorbed the costs of transportation, the actual price varied from customer to customer depending upon location. Some department stores charge for shipping goods out-of-town whatever the size of the purchase. Others do not charge if the shipping expense does not exceed what the store estimates to be its delivery cost by truck to points within the city. Still others absorb the freight costs if the purchase is of a sizeable amount. In some industries the transportation charge is itself based upon a fiction. Milk producers in the Philadelphia milkshed are assessed less-than-carload rail rates for their produce shipped for fluid purposes. Actually much of the milk is shipped by truck; and some of it is sent to a factory located near the country plant and never reaches the city. The basing point system in cement or iron and steel is also based upon a philosophy of as-if. A shipping charge is constructed upon a hypothetical manner or point of shipment; and the effect is to make a wide disparity between actual cost for the shipper and the rates charged.

Some goods are subject to a heavy build-up of charges on the quoted price. The f.o.b. Detroit quotation on a new automobile generally represents about two-thirds of the actual price. A rail freight charge for the assembled car is assessed though it may be shipped by water or truck, or carried as parts and later assembled at a nearby branch plant. Here the freight charge is itself fictitious and is an instrument for increasing the manufacturer's return beyond his quoted price. Most cars are purchased on account which adds two further elements—insurance and interest—to the price. And for some the quotation does not include accessories which are regarded as the normal equipment of the automobile. The buyer who desires the car on which the price is quoted—minus the accessories—must wait until a special order is put through the factory.[2] In some industries extra charges are not mandatory;

[2] It is a curious fact that consumers generally think in terms of quoted price despite a knowledge of the other charges that will be added. Down payments also seem to have much greater importance than the size and length of the pecuniary toll over the months.

yet they are so embedded in custom that no purchaser would think of acquiring the ware without making the additional payment. A restaurant meal is advertised for $.50 or $.75; there is no legal compulsion to pay for the service; yet a tip to the waiter is accepted as a part of the cost for the meal. This practice is so established that returns on tips are taken into account in wage payments by employers.

Other competitive practices may shave down the quoted price. During the NRA advertising allowances were a source of industrial discord. Sales of goods to retail stores were frequently at a price concession to cover the costs of window displays and other forms of store advertising. Undoubtedly in some cases this service was performed; but there was no attempt to correlate cost and price concession; and the advertising allowance came to be used as a price-cutting device among manufacturers. Another form of deduction is the "p.m." practice. Some razor blade manufacturers regularly pay "push money" directly to clerks for pushing their wares. In this case neither the customer nor the drugstore benefits; the difference between the manufacturer's actual and quoted price is pocketed by an employee of the retail store. More subtle—and virtually impossible to control—is the wide practice of giving personal gifts to the buyer. The relation of a Christmas remembrance—of some pecuniary size—to a recent contract can never be clear-cut; nor can the wining and dining of a prospective customer even if the cost goes into the incidental expense account of the business. The poker game in the evening may reflect the happy social relation between buyer and seller; or it may be a device, unexpressed but understood between the two parties, for returning a part of the purchase price to the buyer.

Or special services may accompany the sale of the commodity. The palatial filling station and its galaxy of free services is, in part, a substitute for price-cutting; outright price concessions are quick to bring on devastating price wars. A controlled high price would undoubtedly evoke an orgy of greater free servicing and price concessions in greasing and repair jobs which would be nothing more than a veiled deduction on the gasoline charges. At one time the railroads could manipulate prices by varying the services they offered. Special switching or loading and unloading services might be charged separately or included in the freight rate. Under government regulation this form of competition has been ended and the service offered is standardized; but it has been taken over by a keen competitor—the automobile truck. Detection of this form of price concession requires a minute regulation of the industry; and implies a standardization of practice among companies almost impossible to imagine. The long run effects might be to hamper ingenuity in effecting economies and to stultify industrial progress.

The quoted price can summarize only the pecuniary terms of the bargain; yet these may not be a full comprehension of the transaction. The cash-and-carry store sells milk a cent or two cheaper than the price for home delivery; the consumer assumes a part of the freight service himself. The woman buyer preoccupied by a

shopping that is never done cannot translate the time and energy spent into the language of pecuniary symbols; nor the evenings devoted to adapting a ready-made garment to the idiosyncracies of a particular figure. But these items are a significant cost in the purchase of a new dress. Some customers account the interminable sales talk which accompanies the purchase of an insurance policy or a vacuum cleaner as a welcome escape from domestic chores; others regard it as an extra expense which would have a high pecuniary value. The acquisition of a new house on the instalment plan puts a limitation on future expenditures and the direction they may take. In a multitude of ways the consumer is subject to non-pecuniary exactions in the purchase of a commodity.

The use of a commodity may be tied up with another service which must be paid for. What is wanted from an electric iron or toaster is not ornament but function; and the exercise of that function is connected with another purchase—electric power. A radio in use presumes the broadcasting of programs; the cost for these is unrelated to the instrument and is obscurely lost in the prices of goods advertised. The demand for an automobile is the demand for a car going down the highway. The cost for this service includes not only the automobile but gasoline, tire replacement, license plates, usually insurance, as well as depreciation and repairs. Measured in terms of function, the quoted price for a ware is simply one of several charges for goods and services enlisted in its consumption.

Thus the quoted price is vulnerable at several points. A discount may take the form of a direct pecuniary concession for volume. Or it may appear as a trade-in allowance, a loss in a poker game, a dividend, or a premium for continued business. Less obvious are the ancillary terms of the bargain which have an intimate, though not a direct, relation to price. A regulation of prices might direct competition in these non-pecuniary channels. Long and comprehensive guarantees might be granted; easy credit terms would be evocative of business; a host of free "special" and "extra special" services—difficult of transliteration into pecuniary terms—might be run upon a sale.

Or the quoted price may be changed through variations in the character of the commodity. A quotation is for a particular size and a particular quality. Yet the very heterogeneity of goods in the market place makes comparison difficult; and sellers are adept at giving the appearance of uniqueness to their wares. A quality is an attribute of the market as well as a measurement of physical characteristics. The incidence of persistent advertising is to build up "consumer acceptance" at a price irrespective of quality; and the criteria used by buyers for spotting values may be sheer prejudice. Moreover, a quality is rarely clear-cut—either in the market or in the minds of consumers. Under a complex marketing structure a single commodity may be differently packaged and sold at a variety of prices; or a multitude of grades may be given an apparent uniformity through an identity of price. The things that are wanted from a product are many and conflicting; and buyers lay

stress at different points along the scale of values. And if the final test of a commodity is use, the confusion is even greater. The quoted price becomes merely a point of departure in the array of terms in fact integral to the bargain.

All of this is in the nature of background to the phenomenon of price. Yet it throws in sharp relief the problems faced in regulation of competition. The "fair trade" acts of the states may serve their avowed purpose of maintaining resale prices. Or they may stimulate the sale of private brands whose prices down the line of wholesaler and retailer are not fixed by the manufacturer. In that case the regulation will collapse; or it will evoke a competition in areas other than price by manufacturers who desire the protection of resale price maintenance. A steady bombardment of advertising will have the effect of giving the illusion of superior quality for branded products and will carry sales regardless of the price differential. Or a number of auxiliary services—free delivery, the aroma of prestige, generous credit terms—will become the outposts of competition; and the quoted price will be maintained at the cost of a breakdown in the non-pecuniary terms of the bargain.

The devices for converting the quoted price into a fiction in the retail sale have their counterparts in the wholesale transaction. In the Robinson-Patman Act an effort is made to regulate competition through control of the pecuniary discount. But methods of concession-making—which cannot be isolated from the pecuniary transaction—are to be found everywhere in the complex tangle of trade practices; and a limitation on the discount may give a new direction to the competitive struggle for contracts from large buyers. The Act outlaws price discrimination. But the line beween a fair and an excessive price concession—through a discount for volume, an advertising allowance, a customer classification—must be groped for tediously and uncertainly along an array of possible percentages; and the inquirer will find no one of the array of possible concessions standing as a phenomenon in isolation. On the contrary each will be buttressed by jerry-built, confusing and frequently illogical arrangements traditional to the conduct of the affairs of the individual industry. The complexities of the problem are enhanced further by the miscellany of market goods. A slight modification of the commodity, a distinctive form of packaging, the attraction of a familiar brand name makes—in the market—a new grade or quality. In consequence, transactions do not possess the requisite identity for comparisons of price or price concessions.

In a dynamic industrial structure it is impossible to chart the incidence of these experiments in control of competition. But a regulation of the pricing process must be addressed to the current necessities; it must take account of the multitude of arrangements—outside the pecuniary quotation—which are fundamental to the transaction. A survey of the fictitious nature of the quoted price merely sets the stage for a view of the problem of control.

SOLIDARITY IN THE DISTRIBUTIVE TRADES IN RELATION TO THE CONTROL OF PRICE COMPETITION

E. T. Grether*

The problem of this paper is to attempt the hazardous task of interpreting the attitudes of the members of the retail and wholesale trades in relation to the rising tide of demand for legislative control of price competition. The extraordinary temerity of the writer is demonstrated by the census figures for the retail and wholesale trades. The 1935 Census of Business listed 1,653,961 retail establishments in the United States. Of this total 1,474,149, or 89.1 per cent were classified as independent stores and 127,482, or 7.7 per cent, as chain stores. The remaining 3.2 per cent were divided among leased departments, utility operated stores, mail order firms, direct selling types and miscellaneous groups, including consumers' co-operatives. The 1935 retail sales volume totalled $33,161,276,000 and was divided among the chief competitive types as follows: independent stores 73.1 per cent, chain stores 22.8 per cent, all other types 4.1 per cent.[1] For the same year, the Census of Business listed 176,756 wholesale establishments with net sales of $42,802,913,000.[2]

A wide margin of error may easily creep into any endeavor to survey and interpret attitudes when numbers are so large and conditions so variable and complex. In order to minimize the possibilities of error the writer for the most part will interpret the attitudes of the members of the trades in the State of California. Within California, attention will be given in detail to the food and drug trades, although other lines will be examined to some extent. This interpretation is based not only upon the experience derived from a number of years' residence in the state but from formal research on problems of retail price control during the past three years.[3] Readers are warned that there may be significant differences in other states and regions; presumably, however, the California experience has meaning beyond

* A.B., 1922, University of Nebraska; M.A., 1923, Ph.D., 1924, University of California. Associate Professor of Economics, University of California. Consultant in the Division of Review in the National Recovery Administration, 1935-1936. Author of *Resale Price Maintenance in Great Britain* (1935) and other works. Contributor to economic and legal periodicals.

[1] U. S. Bureau of the Census, Census of American Business: 1935, *Retail Distribution* (Vol. IV, Jan. 1937).

[2] *Id., Wholesale Distribution* (Vol. IV, Feb. 1937).

[3] The writer plans to publish a summary of the results of this research within a year. References to studies already published will appear throughout this paper.

the borders of the state because of the large degree of homogeneity within the United States. Further, California has been somewhat of a pioneer in the field of legislative restrictions upon price cutting; hence, the California developments are more mature than in the majority of states.

The analysis in this paper will be limited almost entirely to the two chief types of state legislation which are at present most widely prevalent or are being widely considered and pushed; *viz.*, so-called Fair Trade and Unfair Practices Acts. The term "fair trade law" has become attached to those statutes which legalize resale price control by manufacturers of trade marked products. "Unfair practices" acts are not so homogeneous but for the most part have to do with price discrimination between localities and between individuals, loss leader selling and sales below cost where competitors are injured or destroyed. The core of the so-called unfair practices acts normally is the prohibition of sales below cost in unfair competition. The "unfair practices" type of state legislation in its origin was to a considerable extent the state expression of the anti-price discrimination prohibitions of the Clayton Act.

It should be noted that the problem of this paper is not essentially the economic soundness or unsoundness of the attempts at the control of competition in price.[4] The general assumption of this paper is that it is as important for purposes of regulation to know the nature of the group pressures in our markets as it is to have theoretical criteria of economic evaluation. At the end of the examination of conditions and attitudes in the trade there will be a brief evaluation of these group attitudes and demands.

Unfortunately even in the field of trading interests, a reasonably realistic appraisal requires the recognition of the play of other motives than those of the "economic man." The economic self-interest of dealers is incased not only in layers of ignorance and prejudice but time and again gives ground to the innumerable influences of an emotional, sentimental and institutional quality. Particularly important always is the factor of leadership in the trade. In the typical trade in which there is a mass of small dealers, it is necessary to recognize at least three zones of variable homogeneity in interests and conduct within this class. There is in the first place, the core of the trade, composed of the officers of the trade association and the active and influential members of the association; and in the second place, a large group of inactive members and others to some degree reached by the association's program; and, finally, often a still larger inchoate group, entirely unorganized, or at best inactive. Not infrequently these smaller operators are unaware of, or uninterested in, the program of the association which claims to represent them. In addition to these gradations of apparent similarity of interests, there is commonly at least a

[4] The writer's position with respect to these aspects of the problem will be found elsewhere. See, *e.g.*, the following publications by the writer, RESALE PRICE MAINTENANCE IN GREAT BRITAIN (1935); *Restriction of Retail Price Cutting With Emphasis on the Drug Industry*, WORK MATERIALS No. 57, DIVISION OF REVIEW, N. R. A. (1936) 187-284; *Experience in California With Fair Trade Legislation Restricting Price Cutting* (1936) 24 CALIF. L. REV. 640; *Resale Price Maintenance and the Consumer* (1935) 2 AM. MARKETING J. 144-149; *Fair Trade Legislation Restricting Price Cutting* (1937) 1 J. OF MARKETING, 344.

small cluster, often a large grouping, of important and active dissenters, *e.g.*, chain stores, "cut-rate" establishments and sometimes irregular types. Hence, from the standpoint of the problem of this paper it is impossible to understand the degree of solidarity present merely by reference to the official statements of officers of trade organizations. A recognition of this situation tempers the discussion in the pages that follow.

A priori, three groups of general factors seem of largest importance to the understanding of the degree of solidarity that may be achieved. These factors may be classified as follows:

(1) The relative severity and complexity of competition.
(2) The degree of similarity in type and status among the members of the trades.
(3) The general condition of business.

In relation to these three groups of factors three tentative hypotheses may be derived:

1. The more rigorous and complex competition within and between trades is, the greater will be the demand for relief through legislation unless the complexity of the trade has removed the basis of solidarity.
2. Dealers of the same type or status may normally be expected to react similarly.
3. The reactions under (1) and (2) above should be more or less intense as business fluctuates from depression to "prosperity."

The writer feels strongly that it is the convergence of the influences reflected in these three hypotheses that accounts for the extraordinary vigor of the current demands for legislative interference with price competition. Further, except for this confluence of forces there would, for the most part, be either such diversity of interests or inertia as to produce no major drive for favoring legislation in most lines. Beyond the influences mentioned above, there is one additional significant factor, *viz.,* the rôle of the N.R.A. The N.R.A. not only gave the members of the trades experience in group action and a pattern for the control of trade practices, but also left them, after the *Schechter* case, with the husks of frustrated desires. The important point is that the N.R.A. aroused latent and repressed desires and gave them form and direction. There can be little doubt that the impact of this influence is still decidedly effective in the milieu of factors.

In the post war period, the business of getting goods through the channels of distribution has become increasingly complex. So much so, that the process of distribution has become a veritable labyrinth of confusing and conflicting highways and by-ways. Consequently the ordinary dealer often finds himself in the grasp of competitive forces which leave him completely bewildered. He finds himself competing not merely with dealers of similar type and status but with numerous other types of different organizational form, size, policies, etc. For instance, there may be effective competition within a given market between independent unit, specialty and department stores, department stores operated by a chain, or chains of specialty

stores owned and operated locally, regionally or nationally, mail order houses with or without local stores, the direct-to-consumer efforts of manufacturers through their own stores and/or canvassers, and perhaps consumers' co-operatives or other miscellaneous types. Further, competition is not merely between various types specializing in the sale of the same product but to a large extent between diverse types that have pushed into each other's areas creating so-called "inter-outlet competition" and jurisdictional friction. Even within the group of similar dealers there is conflict because of different buying and merchandising affiliations. Finally, within and between types there is often a tremendous range of variation in merchandising policies. At the one extremity there is still the full service, specialty and department store; at the other, often some form of limited service, "cut-rate" dealer. Between these extremes not infrequently one finds very great diversity in policy. Without doubt, much of this complexity in our markets represents a better adaptation to the variable tastes, wants and situations of buyers. In any case, however, it often seems to have raised formidable barriers to trade solidarity or to have completely confounded many members of the trade.

Table I portrays the division of the national market between chain and inde-

TABLE I

COMPARISON OF RETAIL SALES RATIOS BY TYPES OF OPERATION, 1935, 1933 AND 1929

	Independents			*Chains*			*Other Types*		
	1935	*1933*	*1929*	*1935*	*1933*	*1929*	*1935*	*1933*	*1929*
All stores	73.1	71.3	77.5	22.8	25.4	20.0	4.1	3.3	2.5
Grocery stores (without meats)	60.8	54.3	53.6	38.2	45.0	45.7	1.0	.7	.7
Combination stores (groc. and meats)	60.5	56.1	67.6	39.1	43.7	32.2	.4	.2	.2
Beer and liquor stores (packaged)	48.0	x	x	1.8	x	x	50.2(a)	x	x
Motor-vehicle dealers	95.6	94.6	x	4.4	5.3	x	....	.1	x
Accessories-tire-battery dealers	50.0	x	x	50.0	x	x	....	x	x
Filling stations	77.8	64.3	66.0	21.5	35.5	33.8	.7	.2	.2
Department stores	61.4	67.3	72.1	26.7	23.9	16.7	11.9(b)	8.8	11.2
Variety stores	9.2	8.8	9.8	90.8	91.2	90.1	....	.....	.1
Men's clothing and furnishings stores	78.0	76.5	77.9	21.0	22.0	21.2	1.0	1.5	.9
Family clothing stores	78.9	79.2	71.5	20.6	20.3	27.3	.5	.5	1.2
Women's ready-to-wear stores	72.3	74.5	74.3	25.2	23.3	22.7	2.5	2.2	3.0
Shoe stores	43.3	46.5	53.5	50.0	46.2	38.0	6.7(c)	7.3	8.5
Furniture stores	86.0	84.6	83.9	13.5	14.2	14.2	.5	1.2	1.9
Household appliance—radio stores	48.1	33.2	x	12.6	21.5	x	39.3(d)	45.3	x
Radio dealers	75.6	82.7	79.0	23.1	15.6	19.1	1.3	1.7	1.9
Lumber and building material dealers	75.6	x	x	23.8	x	x	.6	x	x
Hardware stores and implement dealers	95.4	95.6	x	4.3	4.1	x	.3	.3	x
Restaurants and eating places	84.0	84.8	86.1	14.5	14.9	13.6	1.5	.3	.3
Drinking places	99.2	x	x	.1	x	x	.7	x	x
Cigar stores and cigar stands	61.1	65.1	73.5	35.8	33.9	25.1	3.1	1.0	1.4
Fuel and ice dealers	82.7	x	x	16.5	x	x	.8	x	x
Drug stores with fountains	71.1	74.0	81.2	28.8	25.1	18.5	.1	.9	.3
Drug stores without fountains	84.1			15.4			.5		
Hay, grain and feed stores	71.6	x	x	16.0	x	x	12.4(e)	x	x
Farm and garden supply stores	75.0	x	x	4.7	x	x	20.3(e)	x	x
Jewelry stores	90.3	93.6	93.0	8.9	5.9	6.4	.8	.5	.6
All other stores	78.8	79.6	x	14.3	15.0	x	6.9	5.4	x

(a) Principally State liquor stores. (b) Principally mail-order. (c) Principally leased departments. (d) Principally utility-operated stores. (e) Principally consumer cooperatives. (x) No true comparisons available.

pendent and miscellaneous types for the years 1929, 1933 and 1935.[5] There is also considerable variation between regions and cities.[5a] Finally, (in this connection census figures are of little significance) there is the variation within and between markets in price and service policies. As a consequence of the diversity of types and policies, it would appear that there might be very little basis for agreement among members of the trades with respect to the control of price practices. This conclusion seems particularly appropriate from the standpoint of the division of the total volume of sales for not infrequently it is so proportioned between competing types as to leave no group dominant. However, there are two limiting factors: (1) the fact that the smaller dealers normally are clearly dominant in numbers, even if not always in proportion of sales, and (2) there is to some extent sufficient unanimity of interests on certain issues between competitive types to lead to solidarity.

The voting strength (so to speak) of smaller dealers was demonstrated to the writer by a survey of dealer attitudes towards, and experience with, price stabilization made during 1935 in the San Francisco Bay region. At the time of the survey, the N.R.A. experience was still fresh in the minds of these dealers.[6] Table II summarizes these expressions of opinions of dealers with respect to price stabilization in general, without reference to particular forms of control. The chief opponents almost always were operators of larger stores or of "cut-rate" establishments. Although there were some decided differences between lines, the survey demonstrated clearly that the overwhelming majority of the retail trade favored price stabilization. In fact, agreement was present to some extent even between types, for larger drug chain systems and upper class department stores also preferred some amount of price stabilization.

As part of the general basis for a more detailed discussion, there remains still the problem of the influence of business fluctuations upon dealer attitudes. It would be an over-simplification to assume that the whole movement for price stabilization is a depression phenomenon. As will be noted below,[7] the cry for resale price control has been heard for many years in the United States. However, the ***breadth*** of the movement for price stabilization and its ***vigor*** in the last few years can be accounted for only in terms of the rigors of the depression. When prices, and with them volume of sales, slipped downward as the depression lengthened, there was a dual repercussion: first, the general decrease in dollar volume; second, a transfer of

[5] U. S. BUREAU OF THE CENSUS, CENSUS OF AMERICAN BUSINESS: 1935, *Retail Distribution* (Vol. IV, Jan. 1937).

[5a] Space does not allow a portrayal of regional and metropolitan variations. Details may be found in the Census report mentioned in note 5, *supra*.

[6] This survey was made possible by federal relief funds. Although there was a wide coverage of dealers it was not complete because the relief investigators for the most part were directed into the lines for which their experience fitted them. Two notable omissions are grocery stores and drug stores. These lines were covered by the writer in another connection in an intensive investigation of these two fields. In both of these lines, as in most of the other trades, the smaller dealers were in favor of the stabilization of prices by a large majority.

[7] See pp. 381-382, *infra*.

TABLE II

ATTITUDES OF RETAILERS TOWARDS ATTEMPTS AT PRICE STABILIZATION IN THE SAN FRANCISCO BAY REGION, 1935

(Expressed as Percentages of Number Interviewed)

Lines of Goods Handled	*No. of Dealers*	*In Favor*	*Opposed*	*No Opinion*
Automobile vehicles	77	87.01	12.99	....
Automobile accessories	41	95.12	4.88	....
Automobile filling stations	71	97.18	2.82	....
Bakery	116	94.83	5.17	....
Beer	183	93.98	2.73	3.29
Wine and liquor	173	95.38	4.62	....
Clothing, mens'	34	70.59	29.41	....
Clothing, womens'	107	71.96	28.04	....
Confectionery	69	91.30	2.90	5.80
Feed and fertilizer	18	77.78	22.22	....
Fuel	91	70.33	17.58	12.09
Furniture and house furnishings	89	74.16	25.84	....
Gas and electric applicances	109	95.41	4.59	....
Electric motors	19	89.47	10.53	....
Hardware	152	88.16	6.58	5.26
Jewelry	54	79.63	20.37	....
Meats	203	93.10	6.90	....
Music	33	81.82	18.18	....
Paints and glass	171	97.08	0.58	2.34
Photographic supplies	217	99.08	0.46	0.46
Plumbing	113	100.00	....	....
Radio	123	90.24	7.32	2.44
Seeds	4	75.00	25.00	....
Shoes	86	75.58	23.25	1.17
Sporting goods	112	97.32	1.79	0.89
Tobacco	117	99.15	0.85	....
Totals	2582	90.70	7.78	1.52

business to the retail types that sold at lower prices. Dollar volume of retail sales for the United States declined from $49,114,653,000 in 1929 to $25,037,225,000 in 1933. Unfortunately there is no measure of the shift to the lower price types of enterprise. Some evidence of the shift is indicated by the fact that the proportion of sales of chain stores from 1929 to 1933 increased from 20.0 per cent to 25.4 per cent. It is significant that the chain store ratio by 1935 had fallen to 22.8 per cent. These lower price types were either consistently below the market because of lower costs and limited services, and often because of the sale of distress goods, or gave this impression through the heavy use of loss leaders. The state of affairs in the drug trade in California is without doubt typical for the majority of retail trades. In Table III are listed the summary results of a number of studies of the advertised prices for drug products in California in the spring of 1933 in comparison with the contractual minimum prices in 1934 when these items were controlled by manufacturers' fair trade contracts.

Thus, in the metropolitan centers of California, advertised drug prices in the trough of the depression were approximately 75 per cent of the 1934 contractual prices. The disparity, usually, was less in smaller centers, especially rural towns.

TABLE III

COMPARISON OF ADVERTISED PRICES ON DRUG PRODUCTS IN CALIFORNIA COMMUNITIES DURING THE FIRST SIX MONTHS OF 1933 WITH THE STATED PRICES* AND WITH 1934 CONTRACTUAL PRICES†

City or Town	*1930 Population*	*Number of products*	*Number of quotations*	*Percentage of 1933 average actual prices to average stated prices*	*Percentage of 1933 average actual prices to 1934 contractual prices*	*Percentage of average stated prices to the contractual prices*
Los Angeles	1,238,048	210	966	57.87	75.31	131.22
San Francisco	634,394	134	706	57.58	74.53	130.41
Stockton	47,963	110	271	63.70	78.50	123.63
Santa Barbara	33,613	76	183	58.20	75.40	130.84
Riverside	29,696	53	98	61.44	74.72	122.05
Modesto	13,842	68	264	55.37	69.46	125.84
Visalia	7,263	64	270	77.67	96.41	122.70
Corona	7,018	20	25	68.23	85.53	125.17
Martinez	6,569	23	34	73.37	84.85	119.85
Turlock	4,276	28	41	63.57	87.44	131.06
Exeter	2,685	22	31	84.00	103.65	123.85
Dos Palos Under	1,000	27	43	73.57	87.10	118.53

*The stated price is the price from which the advertiser alleged he was cutting: the actual price is the price at which he was selling.

†The contractual price is the minimum or fixed retail price fixed in the manufacturer's resale price maintenance contract with the distributor.

Since these prices were taken from newspapers they represent for the most part the public prices of "cut-rate" firms and chain stores. It is interesting to note that the actual prices were approximately 42 per cent lower than the alleged (stated) prices. This percentage, of course, represents merely a measure of the comparative value claims of the advertisers.

By contrast with the price reductions on the part of the metropolitan "cut-rate" institutions, the great mass of independent druggists held their prices at a much higher level.[8] Hence, these dealers increasingly were losing business to their lower price, limited service competitors. The same state of affairs existed to some extent in the grocery trade in which the super-market began to flourish; and to a degree, no doubt, in all retail lines. The consequences were twofold: (1) the majority of small dealers congealed into a solid block, desirous of price control; (2) some of their arch-competitors, as chain systems and department stores, aligned themselves with them.

So much for general discussion. In the next place, it is necessary to examine in detail the specific expression of the general demand for some measure of price stabilization. Since the resale price maintenance issue has historical precedence it should be examined first. The large and rapid increase in the sale of products under the brands of manufacturers at the end of the last century and since, created the problem of the degree of control over resale prices which manufacturers could and

[8] For detail, see Grether, *Experience in California with Fair Trade Legislation Restricting Price Cutting*, *supra* note 4, at 677-678.

should exercise. The problem is not peculiar to the United States but appeared throughout the world, particularly in the highly industrialized countries. In the United States, the issue has been focussed differently from many other parts of the world because resale price maintenance following 1908 was largely unlawful in the United States.[9] Since the problem has been a matter of wide controversy in the United States and elsewhere for at least three or four decades, it cannot be assumed that it was merely a depression phenomenon. For instance, each session of the United States Congress since 1914 has had one or more bills legalizing resale price maintenance placed before it. The whole issue has been sufficiently acute to produce a number of governmental hearings and a large polemical literature. As a result of the play of interests, controversy and discussion during these years, it is now possible to be fairly specific concerning the nature and intensity of the forces that are effective. Resale price fixing on the part of producers or their representatives can be employed effectively only for a minor portion of the retail business in this country. In the first place, it is applicable only to the differentiated commodities bearing producers' and owners' trade marks. In the second place, either because of lack of interest on the part of manufacturers or because of the serious resistances to effective control, it cannot have general application even within the field of branded goods.[10] Hence, theoretically the degree of interest in and the amount of support given this form of price stabilization should be related closely to its likelihood of general adoption. Actually, the support nationally and in California has been much broader.

Table IV summarizes the expressed attitudes of retailers in the San Francisco Bay region toward resale price maintenance in 1935. Particularly important is the large amount of total agreement, as well as the disapproval in certain lines, as in furniture, womens' clothing, and shoes. However, it is extremely important that the interviewers reported that half of the dealers expressing themselves were entirely unfamiliar with the California Fair Trade Law which had been enacted in 1931 and amended in 1933. The only conclusion that seems reasonable is that the majority of retailers would express approval of almost any procedure that made for price stabilization even if it had little reference to their own problems. Obviously, the majority could not be actively involved in the organized movement when they were totally unacquainted with the existing statute, in spite of the fact that there had been much discussion of the law throughout the state.

In Tables II and IV the grocery and drug dealers are not included because they were investigated separately.[11] During the summer of 1934 one hundred retail grocers were interviewed in the San Francisco Bay area. All classes of retail grocers were included in the survey; not merely the members of associations. Fifty-seven per cent of these dealers were at that time unacquainted with the statute. This

[9] For the general and legal history, see, particularly, SELIGMAN AND LOVE, PRICE CUTTING AND PRICE MAINTENANCE (1932).

[10] For a discussion of the general resistances to resale price control see GRETHER, RESALE PRICE MAINTENANCE IN GREAT BRITAIN (1935) 292-300.

[11] For detail, see the second and third references, *supra* note 4.

TABLE IV

ATTITUDES OF RETAILERS TOWARDS RESALE PRICE CONTROL BY MANUFACTURERS IN THE SAN FRANCISCO BAY REGION, 1935
(Expressed in Percentages of Number Interviewed)

Lines of Goods Handled	*No. of Dealers*	*In Favor*	*Opposed*	*No Opinion*
Automobile vehicles	77	92.21	7.79	....
Automobile accessories	41	92.68	7.32	....
Automobile filling stations	71	95.77	4.23	....
Bakery	116	89.65	10.35	....
Beer	183	92.90	4.37	2.73
Wine and liquor	173	90.75	9.25	....
Clothing, mens'	34	85.29	14.71	....
Clothing, womens'	107	65.42	34.58	....
Confectionery	69	91.30	4.35	4.35
Feed and fertilizer	18	83.33	16.67	....
Fuel	91	72.53	20.88	6.59
Furniture and house furnishings	89	48.31	47.19	4.50
Gas and electric appliances	109	96.33	3.67	....
Electric motors	19	84.22	10.52	5.26
Hardware	152	91.45	5.26	3.29
Jewelry	54	68.52	20.37	11.11
Meats	203	92.12	7.88	....
Music	33	75.76	24.24	....
Paints and glass	171	95.91	1.75	2.34
Photographic supplies	217	98.16	0.46	1.38
Plumbing	113	100.00	....	....
Radio	123	89.43	7.32	3.25
Seeds	4	50.00	50.00	....
Shoes	86	54.65	40.70	4.65
Sporting goods	112	91.96	8.04	....
Tobacco	117	98.29	1.71	....
Totals	2582	87.92	10.34	1.74

result was particularly surprising because resale price maintenance has been a controversial issue in the grocery trade since the beginning of the century, and the official retail grocers' associations had been active champions of the Fair Trade Law and had taken credit for its passage. The fact that so many retail grocers were unfamiliar with the law is an excellent demonstration of the three zones of influence mentioned above. It should be noted that ninety-one per cent of these dealers, though, expressed approval of resale price fixing. The chief dissenters were the chain stores and smaller firms featuring cut prices.

By way of contrast, the results of a similar survey in 1934 among drug retailers in the San Francisco area is extremely enlightening. In this instance, all were acquainted with the Fair Trade Law. This difference in familiarity is traceable to (1) the fact that the law was being actively employed in the drug trade, (2) the drug trade is smaller, more cohesive and better organized, (3) the higher average level of training and ability in the drug field.

To date, the California Fair Trade Law has been employed most largely in the sale of drug products, and to a considerable extent in the sale of cigars, wines and liquors, photographic supplies, stationery and office supplies. There has been some

slight usage in groceries, household furnishings and hardware. Beyond this there has been much discussion with scant results in some other lines. Finally, there are a number of lines where the law would be employed if necessary but where, apparently, equivalent results are obtained without it, as in the book and automotive vehicle lines. As far as the writer knows, this is the situation in other states that have passed fair trade laws. Hence, it is clear that the legislative successes achieved are in spite of the fact that this form of procedure can serve only a minority of the dealers effectively.

The brunt of the legislative battle in California and nationally has been carried by the official organizations of the retail druggists, with some assistance from allied retail associations (such as the grocery, book, hardware, tobacco) and aided by wholesalers' associations and to some extent by manufacturers. Within the last fifteen to twenty-five years there has been a fundamental shift in the alignment of forces. During the early period manufacturers were the prime motivating forces. Today, the retail tradesmen are the most active influential element in the movement. This shift is traceable partly to the increased organizational effectiveness of reailers, but more definitely to the increase in the importance of large scale retail types in the recent period. The increase in the severity of competition congealed the smaller dealers into an effective unit in opposition to department stores, mail order houses, and chain stores who have been the most influential opponents of resale price control. As already noted, during the depression period the effectiveness of smaller "cut-rate" institutions has weaned some of the drug chains too from their early opposition.[12]

The changing status of the trades, as the large scale distributive types became important, has created a serious dilemma for manufacturers when these larger distributors oppose resale price fixing. Further, the more effective organization of the smaller dealers into bargaining groups has complicated the problem for manufacturers. Small dealers, especially in the drug trade, have demonstrated great strength in enforcing boycotts, and particularly in bargaining for what are considered adequate margains. Apparently many manufacturers have become lukewarm about the whole business and would prefer to play a passive rôle. Unfortunately for them, the dealers in their new found strength refuse to allow them to remain aloof.[13] However, it should be noted that there are many manufacturers, particularly in the drug trade, that are active proponents.[14]

[12] It seems clear that the reason for this change in attitude was not merely the depression but the general tendency of mature organizations to prefer conservatism and stability to the methods which they employed to purchase their own positions in the market. Further, the extraordinary financial success of the Boots Pure Drug Company in Great Britain amply proves that a large manufacturing and distributing group can thrive under price control. For details, see GRETHER, RESALE PRICE MAINTENANCE IN GREAT BRITAIN (1935) 307-311.

[13] For examples of manufacturers forced into line by the organized dealers, see Grether, *Experience in California with Fair Trade Legislation Restricting Price Cutting*, *supra* note 4, at 672-673.

[14] Q. Forrest Walker, Economist for R. H. Macy & Company, takes the position that there has been no fundamental realignment of the groups in the trade but that "the manufacturers have remained in the background" and have allowed the public expression to show itself through retail and wholesale associations. See his pamphlet, *An Exposé of 'Fair Trade' Laws* (R. H. Macy & Company, 1937). Quite

Since the last generation, there has also been a fundamental realignment within the wholesale groups. At the beginning of this century when chain stores and co-operative buying groups were in their infancy, and when the channels of trade were much less complex than today, wholesalers often preferred to operate without price restrictions in their markets. In the grocery business in California, for instance, an important group of wholesalers vigorously opposed resale price fixing.[15] In the recent period, wholesalers can almost always be expected to react with retailers on problems of price control, unless they have moved far from the field of wholesaling *per se* and have become largely manufacturers or private label houses. In fact, the wholesale druggists and the wholesale grocers are among the most active proponents of resale price maintenance and of sales below cost provisions as well as of the Robinson-Patman Act. With respect to resale price fixing the attitude of the wholesalers is tempered by (1) the fact that they depend upon the large numbers of small dealers for volume, (2) the fact that resale price maintenance tends to reduce the amount of direct selling on the part of manufacturers. If wholesalers succeed in becoming effective policing agents for manufacturers in those fields where resale price fixing is feasible, they should gain greatly under the system; otherwise, the burden of enforcement may lead manufacturers to make more direct contacts.

The forms of procedure other than resale price maintenance are also seen in clearer perspective in California than elsewhere. In 1913 there was enacted in California a law entitled "The Unfair Competition Act." The core of this act was a provision declaring it unlawful to discriminate between different sections, communities, cities, or between different locations in the state, by selling at a lower rate than justified by quality, quantity, or cost differences "with the intent to destroy competition of any regular established dealer."[16] A check of retail trade journals in the states indicates that this act aroused no great interest. Apparently its passage reflected merely the general attitude in the United States towards trusts and combinations which produced the Clayton Act in 1914.

In 1931 the 1913 statute was revived and amended, under the title "The Anti-Discrimination Act." However, the changes were not significant, consisting primarily of slight modifications in the anti-discrimination provisions and in additional penalties.[17] In 1933 two important amendments were added. In the first, it is stated that the secret payment or allowance of rebates, refunds or commissions, or unearned discounts, whether in the form of money or otherwise, or secretly extending to

---

possibly some manufacturers who are ardent proponents of resale price fixing might consider it better tactics to have the case presented by and from the retail point of view. However, the writer has in his files reports on interviews with manufacturers which show changes in attitude. Further, as far as California is concerned, the vigour and apparent spontaneity of the movement among retail druggists indicates that it represents a fundamental urge on their part.

[15] For details, see the unpublished M.A. thesis of Lorenzo A. McHenry, of the Graduate School of the University of California, *The History of Price Stabilization Attempts in the California Grocery Trade, 1906-1936.*

[16] Cal. Stat. 1913, pp. 508-510.

[17] Cal. Stat. 1931, pp. 1333-1335.

certain purchasers special services or privileges not extended to all purchasers buying upon like terms and conditions, to the injury of a competitor and where such payment or allowance tends to destroy competition is an unfair trade practice.[18] In the second amendment, which was entitled "The Sales Below Cost Act," there was the prohibition of sales below cost or the giving away of an article or product "for the purpose of injuring competitors and destroying competition."[19]

In 1935, this whole group of acts as amended was revised and took the form of the lengthy and now well-known Unfair Practices Act.[20] The 1935 act reiterated the earlier anti-discrimination provisions as well as the prohibition of secret payments, allowances, etc. Its most significant modification had to do with the 1933 sales below cost provision. Three extremely significant additions were made to it: (1) costs were defined more closely, (2) there was a provision for cost surveys in a trade and in a locality to establish costs, (3) municipal, or other public corporations and trade associations, as well as "persons, firms, and private corporations" were empowered to maintain actions under the act.

Cost of doing business, as applied to production, was defined "as including the cost of raw materials, labor, and all overhead expenses of the producer." As applied to distribution, cost was defined as "invoice or replacement cost, whichever is lower . . . plus the cost of doing business." Cost of doing business, in this instance, was defined as "all costs of doing business incurred in the conduct of such business and must include without limitation the following items of expense: labor (including salaries of executives and officers), rent, interest on borrowed capital, depreciation, selling cost, maintenance of equipment, delivery costs, credit losses, all types of licenses, taxes, insurance and advertising." Exceptions to the sales below cost prohibitions were made (1) in a *bona fide* closing out sale, and in the sale of seasonal and perishable goods to prevent loss by spoilage and depreciation, (2) in the sale of deteriorated goods when notice thereof is given to the public, (3) in the sale by an officer acting under the orders of a court, and (4) it was held lawful "to meet the legal prices of a competitor" in the same locality or trade area.

In this paper it is largely unnecessary to discuss the problem of the interpretation of these laws, particularly the 1935 act. In brief, it should be noted that (1) difficulties in terminology will likely lead to additional amendments on the part of the 1937 legislature, (2) the basic sales below cost provisions as interpreted and employed have led not to price fixing but merely to establishing low loss limitation floors to markets, (3) the most significant developments have arisen out of trade association activity. Thus the possibilities under the Unfair Practices Act by contrast with the Fair Trade Act are as follows:

[18] Cal. Stat. 1933, p. 793.

[19] Cal. Stat. 1933, pp. 1280-1281.

[20] Cal. Stat. 1935, pp. 1546-1551. All of the prohibitions are limited as in the earlier acts to situations where the intent is "to prevent competition" or is "for the purpose of injuring and destroying competition."

1. Action under the Act is horizontal instead of vertical as in the case of resale price maintenance.
2. The protection afforded under the Act, potentially, is universal, and not merely limited to trade marked goods.
3. As employed and interpreted, it does not allow price fixing with full margins but merely restricts price discrimination and curbs loss leader selling.

Unlike the Fair Trade Law, the passage of the significant amendments to the 1913 Unfair Competition Act in 1931, 1933 and 1935 seems clearly a depression phenomenon. In fact, proof is written into the 1935 act which was declared "an urgency measure" and ends with the statement that "the sale at less than cost of goods obtained at forced, bankrupt, closeout, and other sales outside the ordinary channels of trade is destroying healthy competition and thereby forestalling recovery. If such practices are not immediately stopped many more businesses will be forced into bankruptcy, thus increasing the prevailing condition of depression." However, in order to appreciate fully the support given the act it is necessary to note two other influences, (1) the influence of the N.R.A., and (2) the increased importance of chain stores following the war period and of "cut-rate" establishments during the depression. When the 1913 act was passed little notice was taken of it in the retail and wholesale trades because chain stores were not as yet major factors in the retail market in California. In the recent period, the small dealers have rallied behind the amended statutes in part, in addition to the depression factors, because they were considered anti-chain.

The associations of independent retailers and of wholesalers have been the influential political forces behind the Unfair Practices type of legislation, even as in the case of the Fair Trade Law. However, in this case the center of the movement was shifted from the drug trade to the grocery trade, aided by allied organizations, particularly in the tobacco trade. The Unfair Practices Act, because of its wider potential coverage, commanded broader support.[21]

One aspect of this support is particularly noteworthy. The provision for trade association activity produced a considerable following among trade association executives who envisaged the possibilities for the expansion of associational activities into the area left open upon the collapse of the N.R.A. In fact, in the grocery trade, the early enforcing agencies were announced as the successors to the Code Authorities.

The ultimate test of solidarity among the members of distributive trades, of course, is not the official public statements of executives of associations, nor the ex-

[21] Specific evidence concerning the variety of support accorded the Unfair Practices Act is given in *The California Retail Grocers' Advocate,* March 26, 1937, in a list of associations represented at the conference in Sacramento to recommend revisions of the Act. There were present at the meeting representatives of: The California Retail Grocers' and Merchants' Association, Northern California Retail Tobacco Dealers, Northern and Southern California Wholesale Tobacco Dealers, Wholesale Liquor Dealers, Retail Liquor Dealers, Northern and Southern California Retail Druggists' Association, California Printers' Association, California Pharmaceutical Association, Allied Automotive Industries of California, Home Owned Businesses of California, California Lumber Association, California Dyeing and Cleaning Association.

pressed attitudes *pro* or *con* of individual members of trades but the *actions* of the individual firms under schemes of price stabilization. If "actions speak louder than words" then much of the evidence concerning the general attitude of dealers provided in the preceding pages must be discounted heavily. Apparently for many and often for the majority of dealers, there is a large hiatus between actions and avowed and tacit objectives. It has already been noted that there are often definite differences in attitude between conflicting types within and between trades as well as broad zones of variation within a given grouping of small dealers. These differences between competitive types and within an apparently homogeneous group become even more marked when put to the test of a definite scheme of control.

There is now considerable evidence concerning the quality of actual (as oppposed to lip service) support given resale price control and the procedure of the Unfair Practices Act in California. In the case of the Fair Trade Act, there can be no doubt that in the retail and wholesale drug trade the gap between expressed aims and actions has been small. Retail druggists have co-operated effectively with their official associations and under the famous so-called "Captain Plan."[22] Apparently, much of the same type of vigorous direct action has been effective throughout the country. However, the following exceptional conditions make it unwise to generalize from this experience: (1) the trade has been under extreme pressure, organizationally speaking, and it is dubious that the same degree of fervor will continue indefinitely, (2) as compared with many other lines, druggists represent a small cohesive group with a high level of professional training, (3) much of the gain claimed by, and for, certain manufacturers very likely will be lost to them as the number fixing resale prices increases, (4) when items are relatively inconsequential in the dealer's assembly, the presence or absence of price control may not be the decisive factor determining his attitude, (5) except for periods of extreme pressure, the majority of dealers are apt to follow lines of least resistance and of immediate self-interest in the sale of goods. Even within the drug trade, some manufacturers who in general have supported the movement for resale price control, have become lukewarm or held aloof because they felt that retailers were not co-operating actively with them. Manufacturers have complained on two scores: (1) the lack of aggressive, individual selling attention given their controlled lines, (2) the difficulties of enforcement. The latter problem is especially trying for manufacturers. Under the contractual procedure of the fair trade laws, the burden of enforcement rests chiefly with the manufacturers, assisted to some extent by retailers and wholesalers.

To date, in California, there have been many resistances to enforcement, partly because manufacturers have been loath to assume the full burden. Much of this unwillingness, however, reflects some degree of absence of co-operation on the part of the dealers who have fought for the system. Resistances and difficulties such as these are the normal expression of any scheme of price fixing. They could be overcome to a considerable extent in some lines if it is considered lawful in the United

[22] For details, see the pamphlet by Warnack, *The California Fair Trade Act* (1935) and Grether, *Experience in California with Fair Trade Legislation Restricting Price Cutting*, *supra* note 4.

States, following the favorable Supreme Court decision in the Illinois and California fair trade cases, to organize associations comprising all the chief factors in the trade as in Great Britain.[23]

In the majority of retail lines it is to be expected that, as far as resale price maintenance is concerned, there would be a decided difference between the opinions and desires of dealers and their conduct. Typically, short run competitive conflicts of interest as well as complexities of merchandising dictate either violations of a fixed price schedule or little or no attempt to push the items so controlled. For instance, in California, since the first decade of this century there have been a number of significant attempts at resale price control in the grocery business. A good portion of the failure of these attempts must be charged not merely to the law and courts, but to the lack of effective co-operation on the part of the members of the trade. Some of this difficulty, admittedly, might be removed by broad and effective co-operation among the members of the trade. However, the resistances are so great that results are bound to be relatively meager compared with the drug field. Hence, there is no true basis for group solidarity over a period of time.[24]

The procedural difficulties in connection with the use of the Unfair Practices Act well illustrate the same state of affairs. Since the largest development has occurred in the grocery business, the experience in this field is most important. Early in the summer of 1935, following the passage of the Act, the organization of the grocery trade began under its aegis. The Southern California Food and Grocery Bureau was the first organization formed. Shortly, two major organizations appeared in Northern California; *viz.*, the Food Trades Institute, sponsored by the California Grocers' and Merchants' Association and the Food Industry Bureau in Alameda and Contra Costa Counties. Similar endeavors appeared throughout the smaller cities in the state, usually in connection with local grocers' associations. The purposes of the various bodies have been to interpret the Act to the trade, to obtain compliance amicably when possible, and when necessary to take action in the courts. In the first stage, an attempt was made to levy assessments upon the members of the trade as under the code; however, it was impossible to operate effectively in this manner without power of compulsion. Hence, the expenses have been carried by voluntary contributions, often from a small minority in the trade. The difficulties of financing and supporting the program have led to (1) the placing of an increasing amount of pressure upon the district attorney's office to take action under the Act and (2) the introduction of a bill into the legislature for the establishing of a State Trade Commission to enforce the Act.

Thus, in this instance, as in the case of the Fair Trade Act, the semblance of active, vociferous, public support of price stabilization is often belied by apathy, indifference, and practices derived from immediate, specific competitive expediency.

[23] For a description of British forms of organization and operation, see GRETHER, RESALE PRICE MAINTENANCE IN GREAT BRITAIN (1935) 276-292.

[24] In *The California Retail Grocers' Advocate*, March 19, 1937, there is an anonymous article "Are Fair Trade Acts Desired?" in which retailers are roundly criticised for their lack of merchandising support of the small group of items under contract in this field.

Group opinion clearly favors the scheme of price stabilization; individual action often perforates the seemingly solid front. It seems to the writer that a portion of the movement may be expected to wear itself out against enforcement resistances if it continues on a voluntary basis. Even on clear cut issues it is possible to hold the effective support of large groups of small dealers only through exceptional organizational effort. In the recent period, the chain store tax issue was an excellent team mate for the price stabilization proposals. In fact, since the issue in this case was clearly one of independent dealers versus chain stores, the normal assumption would be that the smaller dealers would present a solid front. Yet last fall when the whole matter was placed before the people of the state, the small retailers did not rally behind the tax proposal as a solid unit. It seems likely that the chain store tax measure would have been adopted if there had been effective co-operation among all the retail groups.[25]

In summary it should be noted that:

(1) There is at present apparent pronounced solidarity of interests in the distributive trades with respect to the demand for price stabilization.

(2) The public support for resale price control is broader than its actual possibility of application.

(3) The *public* expression of this demand for fair trade laws and unfair practices acts in most lines is more pronounced than the actual foundation among the great mass of small dealers.

(4) The *vigor* of the current movement is to a considerable extent a derivative of the depression and of the N.R.A. experience, and hence may dissipate itself materially if business improvement continues.

(5) Beyond the depression and N.R.A. influences there is the basis for a large permanent demand for the control of price competition because of the increase in the complexity and severity of competition and the improved effectiveness of trade organizations.

In conclusion, a few general comments seem desirable. In the interpretation of group pressures of the sort discussed in this paper, it is essential to keep in mind that short run interests and simple solutions may be expected to be dominant. The great mass of small dealers in the very nature of the circumstances may be expected to confuse immediate and long run forces, and even to disregard completely the ultimate results of their demands. Just as the ordinary person on the street explains the phenomena of depressions in terms of under-consumption and over-production, so the typical small dealer may be expected to assume that his loss of volume is traceable to the nefarious activities of predatory price cutters. The whole issue is confused by the absence of a clear distinction between the sound price reductions that are the essence of the play of supply and demand forces, and price practices in unfair competition. Although the public demand of the official leaders of the movement is for the control of "loss leader" selling, the faith that drives many of their followers is derived from the assumed security that would come from controlled

[25] An example of the dominance of immediate, short run interests as far as many small dealers are concerned is the fact that hundreds of them in the grocery trade are heavy patrons of a leading chain system's wholesale house, in spite of the opposition and efforts of retailers' associations. This state of affairs is an excellent demonstration of the dictatorship of the acute problem of immediate survival.

prices and guaranteed margins. Implicitly, at the core of the movement there is the basis for a program of restrictionism and price fixing, not merely the hope of purging the trades of unfair price practices.

In addition, there is abundant evidence that the proponents of price stabilization are either unaware of or are disregarding the eventual effects of the procedures that they are pushing. Just as in the case of the Robinson-Patman Act under which the ultimate effects very likely may be decidedly contrary to the expectations, so with the Unfair Practices and Fair Trade Acts. Insofar as the Unfair Practices Acts introduce an apparent element of stability by placing low floors under the markets, they may also, by the same token, increase the rigor of price competition. Price cutting firms, unable to cut a few leaders deeply, must then cut a large number of items thinly. Hence, there is a fundamental readjustment of marking rates and realignment of competitive forces. Evidence to this point is not adequate for thoroughgoing appraisal but it appears that there may even be a slight lowering of the general price level. The smaller dealer would gain only if there were a considerable transfer of patronage from chains and so-called "cut rate" institutions; such a shift would take place only if purchased by these smaller dealers in price competition. A similar situation exists in the case of the Fair Trade Law, although the play of forces is decidedly different. In the relatively small number of fields at present where resale price control can be made effective, there is the strong likelihood that an influx of dealers or an expansion of merchandising services or the growth of private brands would eventually, for the most part, remove the immediate gains, if not destroy them completely. That is, the distributive trades may eventually discover that there are powerful compensatory forces that may remove whatever short run gains are achieved.

However, the movement is sufficiently influential and serious to command the profound attention of economists and political leaders. It is a grave mistake to assume that it will inevitably soon fritter itself to pieces. But it would be a more calamitous error to accept it at its face value and to capitulate to all of its demands. It is high time that the economic issues be stated and that members of the trades and legislators be made aware of the fundamental differences between the control of unfair price practices and generalized schemes of price control. It seems to the writer that in general it is sound public policy to recognize as proper only the elimination of unfair competitive price tactics and to refuse recognition to anything that smacks of price fixing. However, it is essential that some procedure for meeting the demand for the elimination of unfair price practices be provided, if for no other reason than to remove the base of the unsound schemes that range beyond it. Such procedure also would assist vitally in focussing the issues and, hence, it is to be hoped, in clarifying them. There is great danger that the gradual accumulation of unsound legislation will create a situation where the local, state and federal units of government must eventually become the enforcement agencies for price fixing programs.[26]

[26] For instance, at the time of writing, the Board of Supervisors of San Francisco has established a price schedule in the cleaning and dyeing trade.

BUSINESS AND THE ROBINSON-PATMAN ACT: THE FIRST YEAR

Edwin B. George*

I. Lack of Pattern in Robinson-Patman Developments

The Robinson-Patman Act's first year of life has been a turbulent one. This is not an unusual consequence of laws attempting to control the intimate details of business conduct. And the insinuation of this particular law into the private lives of buyers and sellers has been such as to cause a lifting of eyebrows even among those favoring a close affinity between law and business. Some of them feel that in this case the familiarity is a trifle excessive. This however is a question of degrees. More fundamental is the probable feeling of a great majority of business men, and perhaps of lawyers and economists, that the law was provoked by cumulative abuse of the privilege of price favoritism in behalf of large buyers. They approve the principle of control but have been somewhat dazed by its degree.

The first result of the Robinson-Patman Act was a prolonged cacophony of speculation concerning its meaning. It has been a great age for lawyers, except for the fact that they have been hardly less baffled than their clients. "Yes and No" has been the grave concensus of legal opinion on most of the controversial points. This disturbance has not yet subsided, except as it has yielded to weariness. It cannot be expected to subside until the courts at least sketch out rough boundaries for the several economic areas to which the law is to apply. Yet persisting through the confusions are the two important facts (1) that the basic intention of the law is clear enough and (2) that a large number of business men seem willing to give it some kind of practical effect. Facts such as these cannot but be influential. In this case they have probably resulted in a wide variety and degree of change in sales relationships involving discrimination.

The popular questions now beginning to rival those of legal interpretation are, "What is business actually doing?" and, "As a result of voluntary adjustments to date, what if any new pattern of price relationships is emerging?"

* A.B., 1917, University of Pittsburgh; graduate study, 1921, Georgetown University. Economist, Dun & Bradstreet, Inc. Formerly associated with National Recovery Administration as Executive Secretary, Advisory Council; Member, Policy Advisory Group, and Industrial Advisory Board; Chief, Domestic Commerce Division, United States Department of Commerce. Author of "Federal Trade Commission Decision in the Goodyear Case"; "Economic Speculations on the Robinson-Patman Act"; "Evolution of Trade Practice Policy under NRA"; co-author of "Check-list of Possible Effects of the Robinson-Patman Act," and "Business Regulation by Judicial Decree." Author of a number of brochures on foreign and domestic marketing problems, foreign affairs, and finance.

The answers unfortunately cannot be much more assured than the opinions of the lawyers concerning what those answers were intended to be. There is as yet no clear pattern. This fact in itself raises interesting questions. Why, nearly a year after its adoption, should so important an act not have produced responses sufficiently well-defined to permit a reasonably confident forecast of future trends? Does this tardiness argue that the principle of control over discrimination is in itself a well-intentioned error? Or that the amount of control needed is excessive? Or merely that the kind of control necessary to the purpose is such that it must mature slowly in the nature of things, and that impatience at this stage is thoughtless? Or that, irrespective of wisdom, the law was so vaguely drawn that confusion was its only sure consequence and will remain such as long as it stays on the books?

This article will not attempt to pass out tablets of stone on these issues, equivalent as they would be to a judgment on the whole experiment. It may supply evidentiary matter, however, by identifying some of the primary causes of delay, by recording some of the individual and group actions known to have been taken, and by pointing out circumstances that suggest the improbability at least of some of the extreme consequences sometimes depicted. One of the helps in understanding this legislation may be found in a study of why it doesn't jell more quickly.

Why is a comprehensive picture of business adjustments to the Robinson-Patman Act so slow in emerging?

A. The Immensity of the American Market.

A first, simple, and effective reason is that this is a big country. Our merchandising system is extremely elaborate, and the sheer assembly and verification of reports from all trade and industrial fronts would be a staggering task even if methodically planned. And within the writer's knowledge no such large scale enterprise has been attempted. Individual rumors and announcements are endless, but they are seldom checked as to accuracy or reduced to scale. They are valuable chiefly as food for thought.

This reference to the immensity of the American market is arithmetic only, and leaves to later consideration questions of complexity which play an even more important part.

B. Legal Bewilderment.

A more frequently recognized source of friction in the march of events is legal bewilderment. Perhaps it diffuses more than it retards. Even if everyone had set about remaking his policies on June 19, 1936, legal contrariety would have been sufficient to insure absence of pattern.

It would be futile to attempt a listing in this kind of treatise of the legal uncertainties involved. They have been pervasively, persuasively, deprecatingly and unremittingly aired during the past ten months. A few general observations suffice for the present purpose.

This is the kind of law which to accomplish its aim, *i.e.*, control of undue price discrimination, must control many of the steps by which sales are built up, such as advertising, brokerage, promotional aids, etc. Once committed to the enterprise, the lawmakers felt obliged at each step to reach out for the next, if they were not to be left in a state of animate suspension. Progressive embarrassment of this kind is by no means a novelty to the law, and does not prove that this law was all a mistake.

Basically the difficulty is in trying to fit a straight line purpose into the sworls of individual transactions. Even under the anti-trust laws there has been no simple test of legality. The courts examine each complaint in the light of the facts surrounding it, try to anticipate its consequences, and so determine the propriety of the accused practice. To the extent that Congress failed to make itself clear in this latest addition to the anti-trust laws (not to mention Section 3) presumably either the Act falls or has to be saved by judicial amendment. This means legislation by the tedious process of decree, and prolonged unsettlement for both lawyers and executives. Its clearest aspect is that when the lawyers and the courts get through with it, its spirit may, like that of the earlier anti-trust laws, be found to have taken on new and unexpected substance.

At any rate, business men realize that they can make two mistakes: the first in guessing what Congress intended; the second in guessing what the courts will do about what the courts guess were the Congressional intentions. Granting complete sincerity, they can do no more than look at the law's purpose, look at their private marketing tangles, address an inquiry to their conscience, and await correction. Exchange of views among themselves and in public discussion will flatten out personal variations to an extent that in the long run may be surprising, but the lines of uniformity are still too dim to be taken as the contours of a new system.

Another complication is that most sellers have probably not consulted lawyers at all, if for no other reason than expense. In this way they have avoided the divisions of the legal profession, but have probably invented more of their own. In the light of all the foregoing, and of certain technical considerations which will appear later, it seems likely that the one course on which many of the smaller sellers and buyers have unconsciously agreed is to do nothing. If this surmise is correct, it must have a place in the pattern of how business has so far adjusted itself to the Act.

It is at least evident that this law's vagueness has given an unusual amount of play to individualism in compliance. Uncertainty, conservatism, passion for reform, and trade strategy are four of the psychological horsemen riding the wide interpretive ranges of the Robinson-Patman Act. Small wonder that there is still no beaten path.

Mr. Patman, with his eyes fixed on the evils with which he is trying to deal, is not excessively concerned over legal technicalities. He brushes them aside by con-

centrating his attention on purpose, and emerges with a simple analogy to the Golden Rule. This is interesting, but it raises a different set of problems.

The Golden Rule connotes morality and honor. Who could then object to its application to business? But unfortunately law and morality are not quite the same. Morality rests upon deeply inbedded but nevertheless abstract standards for human conduct, while law is both explicit and highly particularized. Its compulsions do not operate in the same way.

Morality is what it is because people feel in a certain way at a given period in a given environment. It belongs to the subtleties and imponderables of life rather than its codified whereas-es. It may be even more important but it has to be reduced to concrete enactment and precedents before people go to jail and pay fines for disregard of it.

This hesitation over an analogy is not an argument against the wisdom of attempting to curb excesses in price discrimination. It does seem to be a reason for confining argument to the more calculable domain of what the economic effects of this legislation will be.

C. Complexity of Business Organization and Functions.

An extremely important reason for the inability of business to make swift and uniform response to this law is found in its own diversification. The kind of variety referred to here is amassed by differing products, functions, trade and financial relationships, locations, and all the differences in competitive method that a few million human beings happen to think of. The forces of competition are eruptive and disorderly, and cast up strange shapes of merchandising just as volcanic action casts up strange geological formations. The collective effect on them of any one scheme of legal landscaping is hard to predict.

The probable need for greater care on the part of sellers in classifying their customers is one illustration. In the field of wholesaling alone are full line and short line wholesalers, service wholesalers, cash and carry distributors, drop shippers, mutuals, chain stores, cooperatives, voluntary groups, desk jobbers, and many others. Most of these will fight for maximum recognition of their special services in terms of trade discounts irrespective of volume, and will resent any preference shown to the others. For administrative purposes these classes will have to be arbitrarily grouped and rated. The problem is not new but the consequences of error are now more serious. It is hardly likely that the Congress passed this law because it felt present habits of customer classification to be too careless, yet reform in this area could be one of its major effects. Such reform might be a little hard on some miscellaneous operators who have been getting on all of their business the best going discount for any service performed; and on those whose petty orders have been really a liability to their suppliers; and on still other members of the very class that Congress was trying to help. It is also hard on prophets. Improvements in classification might be entirely salutary from an economic standpoint, but they

are of too slow growth to warrant a place for some time to come in any precise catalogue of "what is happening under this law"; even though some industries are already having special surveys made by independent agencies of their customers' methods of operation.

Part of the complexity arises from the fact that although business organization is mobile and business processes infinitely varied, the Act gives no clue as to where it expects necessary lines to be drawn. The conceptions we employ—wholesalers, jobbers, etc.; product groups; good, bad and intermediate credit risks; cost categories —are merely approximations for convenient reference. The graduations are usually continuous and most dividing lines arbitrary. "Likeness" between two products, one of the controlling concepts of the Robinson-Patman Act, begins with physical identity and ends with similar purpose. Where does the law cease to apply? Consider the peach and where it starts to differ with itself inside a can. Different size, different number of slices in the can, different amount of syrup, different flavor and quality? Or are all peaches just peaches? Or jumping to the opposite extreme, are all canned goods just canned goods, so that the canner must not discriminate between buyers of caviar and dog food? Of course not, but the majesty of the law may be ruffled occasionally before all such necessary lines are drawn.

The Act itself introduces a new variety of the degree problem, or rather intensifies an old, when it distinguishes between healthy and injurious competition. This involves both determination of the extent to which a particular discrimination contributed to injury and how much injury was done. Thus the product of an industry may be so unimportant to another product of which it eventually becomes a part, *viz.*, buttons sold to clothing manufacturers, that the most erratic price policy could not be charged with causing injury to competition among the purchasers (although it is conceivable that a competing seller might have a case). But somewhere up the scale, presumably culminating in the piece goods themselves, the issue becomes acute.

Another brake on the evolution of this law, which in part stems from the intricacy of business organization, is the sheer inability of some sellers to extricate themselves from marketing jams into which they have been pushed by the pressure of circumstances over long years. Some professional price-cutters, of the type irreverently referred to as "gyps," have by peculiarities of location, volume and method been able to jockey progressively lower discounts from their suppliers. These discounts have thrown the latters' price structures askew and become embarrassing both to them and to neighboring distributors. But no one dares to break loose from this kind of web unless competing sellers do likewise. The law merely adds to the discomfort of those entangled. Its threats, however dire, are still too potential to match the certainty of lost business and prestige in these sensitive spots. Barring a miracle of administrative speed, the only escape so far apparent would seem to be a conspiracy in restraint of trade to observe the Robinson-Patman Act,

perhaps with the interesting result of the conspirators being jointly prosecuted for its violation. These marketing "hot spots" suggest anything but a limpidly serene process of adjustment, even though discrimination is open and severe.

It is evident that business is much more malleable in some areas and in respect to some practices than others, even under the pounding of a law. To the extent that such a law is drastic, its impress will be progressively uneven, and its early effects more apt to suggest a relief map of hard and soft spots in marketing topography than the operation of a national policy. These marketing irregularities extend themselves into irregularities of time, insofar as rate and extent of adjustment are concerned.

Marketing seasons are also a factor. Industries with spring pricing can delay their decision longer than those from whom the law requires immediate decision. Lastly, the differing bargaining position of buyers and sellers in different trades results in dissimilar degrees and methods of compliance, avoidance and evasion which bear no relation to each other and therefore contribute to no pattern. On the contrary, some of them have run directly against the purpose of the Act, fitting into a pattern only as its reserve. Some of these will be considered in a later paragraph.

In short, as a result of the intricacies in business organization and functions the law seems certain to have different effects in an infinite variety of different situations. But there is also a subjective species of complexity to be dealt with, originating in the limitations of the human mind. Literal observance of this Act would require a body of technical knowledge which the average operator does not possess. This knowledge is of law, respecting new tests of legality for which for a long time there will be no familiar standards in commercial usage; and of economics, as in the necessity of determining when competition with another operator is being injured; and of costs.

From a practical standpoint the principal requirement of new knowledge is in the field of accounting. Cost determination, especially in distribution, has always been somewhat speculative and controversial, and perhaps the majority of systems in effect are primitive in comparison with the fine distinctions contemplated by this law. During recent years costs have come in for an uncomfortable amount of emphasis from the average man's standpoint. During N.R.A. days "destructive price competition" was the current threat to civilization in many code sponsors' minds. It took many forms, and required scores of diverse controls, if the world were again to be made safe for business. These controls in turn required standards of measurement; and costs, perhaps the most dubious and doctrinal of all possible standards, were usually the final resort. Improvement in costing practice was not a primary aim, merely a means to an end. No more practical yardstick could be found. Now we have it again. No one will question the desirability of improving general understanding of costs, and in fact that may well be an excellent long term

benefit from this Act. It is perhaps unfortunate however that for the immediate use of sellers trying to observe the law a less rubbery measure of right and wrong seems not to be available. Many unusual computations and allocations have to be made to check conformance with the law and some of them at least have to be matters of private opinion. It is apparent that for this reason alone the first year's adjustments must fall somewhat short of military precision.

These adjustments, once and however made, will be full of arbitrary stopping points and therefore of diversity. Quantity brackets cannot conceivably be cut so fine as to fit a gradual slope of savings. At the other extreme they can easily be made so wide as to offer no real choice to differently sized buyers, and to seriously penalize those lying just under a quantity line. Some industries may not be able to decrease costs at all with increasing demand, particularly when the cost of manufacturing is a substantial part of the sale price; whereas producers of specialties, proprietaries, etc., whose expense is principally in promotion, can accomplish real savings from quantity business.

The business complexity problem is heightened by the law's own pre-occupation with detail. It is a splicing rather than a coupling job, this joining of many legal strands with many operating details. It is intensive rather than defensive or pressure law of the type of earlier regulatory measures. Naturally the reaction of several million human beings to this kind of a change will be more confused and therefore slower to assume fixed form, even though some of the implications of the original anti-trust laws themselves are still in the world's list of unsolved problems.

The foregoing analysis perhaps does no more than affirm the generalities that a law must be appraised in terms not merely of its provisions but likewise of its setting; that there is necessarily a difference between law in books and law in action; and, possibly, that intimate control over complicated situations will tend to widen that familiar gap. There is no finality in such recognitions. The ends sought may be so important as to be worth the cost, and a good deal of legislative experimentation with details may be preferable to the simplicity of a more drastic attack. For instance, if the present flood of federal and state laws purporting to humanize narrow aspects of competition should fail of their purpose, the driving force in them might swing angrily on even more fundamental tenets of free competition. Government participation in management and limitations on size of business enterprise are at least within the post-depression war zone. As used here, the terms are merely abstractions, but in the peculiar temper of frustration it is only history that ill-considered blows can be struck. There may be reasons for trying to make this law work that are more important than irritation with its defects.

But despite confusions and alarms, protest and derision, things are happening under the new Act. The fact that they do not yet add up to a national pattern does not take away too much from their importance. A national pattern is not even essential to the Act's purposes. It was the highly publicized, extraordinary dis-

criminations that aroused sufficient fear and anger to provoke this extraordinary legislation. Business generally is supposed to have disliked them, and to have been willing to see some kind of a halt called. It has even been suggested that if the law should lop off the excesses in price discriminations—and be indifferently applied elsewhere because of the congestion in government agencies and the inertia of business interests at the lower level—it might not correspond to ordinary conceptions of law but still be worth its keep. The threat of irresponsible triple damage suits mars this picture. But until interpretations appear this threat may remain merely potential.

II. Suspected Happenings under the Robinson-Patman Act

So far as is known, no formal inquiry has been made into the number and kind of policy adjustments initiated because of the Robinson-Patman Act that would cut across enough industries to be significant. No story of either slow or historic upheaval in the mass of business practices can therefore be recorded. Such impressions as have begun to take form have to rest on such evidence as can be drawn from trade periodicals, trade gossip, the talk of conventions, inquiries addressed to those who have made a special study of the law, and interchanges of views among lawyers concerning the specific problems submitted to them. This kind of evidence yields a net sense of the trend of affairs rather than a laborious trade by trade build-up, and the product is correspondingly unstable.

Broad categories do have a tendency to take form in the observer's mind whether or not they would survive a methodical check. A division seems to appear for example between small sellers whose business is not of the kind likely to attract attention, and large sellers whose capacity to provoke resentment by their discriminations helped to bring about the Act. The first group must be dismissed rather briefly. There is reason to suspect that a good many small sellers listened gravely to expert analyses of the Act at their Convention and Rotary Club meetings, found it very interesting, agreed with the speaker that it either promised to restore honest competition or was a threat to free institutions, and hurried back to take care of the afternoon's mail. Where they happened to sell a substantial part of their output to large buyers, exceptions undoubtedly occurred. And quite a few, to judge from trade comment, were sufficiently impressed to level off some of their more offensive concessions unless the business was too indispensable to them or buyers resisted too strongly. All of this to the extent that it was given to them to understand their rights and risks under the law.

It is with the actions of the larger sellers that most of the law's effects are principally concerned. Naturally more attention has been paid by this group to the warnings and advices with which the air has been filled since June 19th last. To begin with they had lawyers. Beyond that, it seems likely that under the influence of Convention debate and more frequent personal contact fairly uniform attitudes on the more pressing issues tended to develop. Many of these men have made

their guesses as to what the law means and tried to bring their more dangerous practices into line with its apparent requirements. With some of them this has probably been a matter of making minimum concessions, not exactly those that would bring them entirely within the law, but those that seemed capable of keeping the law from getting after them. As this distinction has been unclear legally, it was not regarded as fatal morally.

With a few of the largest consumer goods industries, however, particularly those enjoying strong leadership, study of the law has been intense, not only with a view to observance but likewise with the design of using its technical provisions to get better control of their marketing practices and loosen the grip of powerful buyers.

This of course is merely a summary of attitudes, the effect of which on prevailing selling practices and relationships throughout the country could still be diverse and lacking in pattern. It is at least speculatively interesting, however, to sift out of these attitudes the particular subjects in which interest has run uniformly high. By tentatively giving this interest the standing of a clue to actions subsequently taken, we may venture on an appraisal of the Act's early effects in specific trade practice areas.

Prices

There seems to be little doubt that many concerns have made a real effort to simplify their price structures as a necessary first step to making them square with the law. This would necessarily involve a recasting of customer classes with some eliminations, and with a particularly hard and unfriendly look at existing quantity spreads. These are in themselves major economic considerations, however, and will be considered separately.

It is doubtful if any one can offer an opinion on whether the general price level has been raised or lowered because of this Act. Controversy has been particularly bitter on this subject, the opposing views being: (hostile to the Act) that prices would soar because the big buyer was deprived of the fruits of his efficiency, and (friendly to the Act) that what was involved here was the general balance of prices between buyers rather than total returns to the seller, and that the big buyer did not get his inside cut because of efficiency anyway. Propaganda has reached this commentator to both effects, allegedly supported by cases. It seems rather obvious that so many distinct and powerful forces have been acting on the price level during the past year that the effect of this single influence, if any, is incapable of isolation.

That the Act would give encouragement to one-price policies was forecast from the beginning. This is one of the easiest and surest ways of winning immunity from the law's penalties, or so it seemed to sellers predisposed to such a policy despite some small discord in the legal fraternity. Occasional instances come to light of manufacturers whose marketing strength has permitted them to put a one-price policy into effect and who have utilized the opportunity to do so. Others have approximated it more closely than in the past. No instances are known of whole

industries moving on to such a plane, although where there has previously been strong trade sentiment in that direction it has certainly not been weakened by the new influence.

It has been frequently asserted since passage of the Act that open pricing, by individuals or by trades, would offer one of the surest defenses against trade suspicion and litigation, and that the many arguments already urged in support of such a policy would be effectively capped by this new incentive. Perhaps this would have happened if the legal status of open pricing systems had been clearer, and it may happen yet. The *Sugar Institute* decision,[1] however, failed to leave a completely open door to the full-fledged open pricing system sought by most of those approving the principle, so that it is not likely that much growth in its use can so far be traced to the Robinson-Patman Act.

Quantity Discounts

There is some fairly definite evidence that extra wide quantity discount spreads have been narrowed since the passage of this Act and probably because of it. After all it was out of such discounts that much of the agitation for the Act had sprung, and it was to be expected that these extremes would be more sensitive to the law's glare and would shrink more quickly. This shrinkage has extended to previously liberal ways of computing quantity. In at least two prominent industries the percentage of manufacturers giving cumulative quantity discounts has been cut in half. Listing practices under which discounts were previously earned for aggregate quantities purchased by mass distributing units from an approved list, do not now carry their former authority. Many advices are being issued by legal and other competent authorities against granting quantity discounts on orders placed through central buying agencies. In each of these cases an insistent finger is pointed at actual cost of sale and delivery as the only acceptable test of an eligible discount.

One of the ironical by-products of this law passed for the uplift of small business has been that very small buyers have been occasionally checked off sellers' lists entirely or have been subjected to closer scrutiny than before with respect to whether or not their orders carried their weight. This kind of customer was endangered even before the Act by the rash of scientific cost allocation with which the distribution trades were successively breaking out. That these customers have found themselves cut off from sources of supply on a wide scale may be doubted for the reason that it is much easier to be careless than it is to be scientific, and in a pinch an order is always an order. Some of it has happened and if enforcement does bring about more exact accounting, the threat will become more acute.

Accounting

Improvement in accounting methods themselves is one of the most commonly expected by-products of the Act. That the subject has received more attention since the passage of the Act most accountants can testify. Unfortunately, however, there

[1] U. S. v. Sugar Institute, 297 U. S. 553 (1936).

is no magic formula for distribution cost accounting; to a regrettable extent some of the key principles still belong to the field of theory; and many sellers have neither the equipment, staff or inclination to enter upon so difficult a task. These practical circumstances conspire in degree at least to temper the stimulus provided by the new law.

The principal reflection here, however, is that the amount of control over such matters necessary to carry out the literal intentions of the law, as defined in Congressional utterances, would be rather staggering. The stimulus may be overdone for best results. Distribution cost analysis by quantities, qualities, territories, customers and even special sales returns and profits from distinct promotional efforts would not be too much to supply the airtight protection against improper pricing for which the authors of these reports seemed to yearn. It goes without saying that no such degree of perfection will even be approximated, but there is nevertheless a great new stirring throughout business concerning methods of checking distribution costs.

Terms of Sale

This subject falls in the category of those about which great interest has been aroused by the Act without yielding any comprehensive evidence as to what has been done. A surprising number of inquiries to specialists on the law has been concerned with the problem whether or not dissimilar terms will be considered in violation of the Act. Forward datings and price anticipations made available to large buyers and not to small ones have caused uneasiness. What the law will finally say about this matter cannot be known, but it may be suspected from the interest shown that sellers are seeking justification for such differences in treatment before they extend it. The same reasoning applies to the charging of higher prices to poor, slow, or doubtful payers. The practice has been common and it had not occurred to most manufacturers to question its propriety. Its propriety is still not questioned but the law may not provide for such distinctions and it is probable that sellers here and there are being more careful.

One of the early drafts of the Act went out of its way to condemn unequal terms of sale, and even though the reference was finally deleted, its sponsors continued to insist that discriminatory pricing was not the way to take care of doubtful accounts. They argued that in the stead of this practice sellers could require cash or refuse to sell.

Surprising as it may seem, some manufacturers have actually discontinued cash discounts. This has been one of the preposterous-looking possibilities that a number of critics recognized during the first rush of argument. Obviously it could follow a hair-splitting construction of the Act. Not many really thought that it would happen on a large scale, nor do they yet. It is merely recorded here that the group that did take this action happened to be an important group, although so far its panic does not seem to have been contagious. Perhaps it was not panic, but an opportunity

to eliminate this particular form of price concession that the group was powerful enough to be able to exploit.

Advertising Allowances

Naturally enough, considering that real or alleged abuses in this field supplied a great deal of fuel for the anti-discrimination bonfire, results have bordered on the spectacular. In some industries such allowances were withdrawn completely and in others drastically curtailed. Latterly, there has been in evidence a creeping return of them, sometimes in line with newly formulated principles and sometimes in the less scientific spirit of holding up a wet finger to the winds of enforcement.

Few words have vaulted into more sudden prominence than the words "proportionally equal." "Proportional to what?" is of course the core of the argument. The solution of making them proportionally equal to sales is attractive to the pure mathematician and repugnant to the seller with a prejudice in favor of his money's worth. Another of the straight mathematical solutions occasionally recommended is for the seller to assume a uniform percentage of all buyers' advertising expenditures. The more common drive however is toward a qualitative treatment of the word "proportionally," under which the seller would stipulate the services that he stood ready to buy, set up measurable specifications for them, and scale his allowances to those specifications. The legality of this solution must of course remain unsettled until the Commission and the courts pass upon it, for it reserves to the seller an amount of discretion that the law's draftsmen probably did not intend. There are very many variations of this scheme, but this seems to be its most popular form as developed to date.

There has been a good deal of talk of the practicability of separating advertising allowances completely from commodity sales and of contracting for them through third parties as in the case of other kinds of advertising. Some advertising agencies have made known their readiness to handle this kind of business but the extent to which contracts have actually been drawn is unknown.

The reaction of large buyers has of course been equally calculating and strategic. Some of them have kept up the pressure for allowances and are probably still getting them in one guise or another, presumably in such dress as to be legally plausible. There has undoubtedly been some private blacklisting of sellers who would not give desired concessions, and there has undoubtedly been an increased emphasis on some private brands to replace lines on which concessions were refused.

On the whole, it is probable that the scale on which advertising allowances were formally given has been reduced and that there has been greater insistence on actual performance of services for which payments are made. These are surface results. Beneath the surface, maneuvering for ultimate position is still going on. And it definitely cannot be said that a new equilibrium for advertising allowances is within near reach.

The situation regarding demonstrators is less clear. A great many sellers, buyers and observers alike have shown a disbelief in the practicability of so dismembering demonstrators as to satisfy the letter of the law. They feel that the alternative of dividing these men's time into the rather minute fractions necessary to relate them to respective size of purchases would be unworkable from a management standpoint even if more humane. It will be noticed that quite a number of cases so far taken up by the Federal Trade Commission involve this issue.

Brokerage

Here is another of the issues arousing great bitterness in the past and which therefore has proved particularly sensitive to the new law. Brokers' organizations were among the law's most active sponsors and it is self-evident that they would be equally concerned over compliance. A survey conducted during the winter by the American Grocery Manufacturers Association indicated that the 20.6% of manufacturers paying brokerage direct before June 19th last had apparently dropped away to almost nothing, although the reduction in those making such payments to Voluntary Group Headquarters was only from 35.6% to 14.4%.

This distinction points up one of the liveliest controversies that the law has yet spawned. There is still extant a respectable body of opinion that brokerage to co-operative headquarters remains legal. The argument runs that the members of such co-operatives retain their freedom of choice in buying and have to be genuinely sold by headquarters on particular brands, that such headquarters render assistance of unmistakable value to manufacturers through their merchandising aids, and that in their intermediate capacity they steady the course of trade and induce repeat business that without their efforts would go wandering over the supply field. Under the influence of this reasoning, rationalized to some extent of course because of the trade pressure accompanying it, many co-operatives are still continuing to demand and some sellers to give brokerage to the formers' central offices. That these robust convictions are not altogether untinged by doubt is suggested by such replies as the following one received in response to the Grocery Manufacturers' questionnaire—"We are not accepting brokerage unless it comes through our national buying headquarters who have hired men to go to jail for us."

Customer Classification

It has been pointed out in an earlier paragraph that proper classification of customers might be usefully stimulated by this law. A letterhead on which some petty retailer has printed the words "Wholesaler" or "Jobber" is a familiar sight in many trades. Manufacturers have differed widely in the amount of care they have exercised over this important problem. Some have set up classes and have adhered closely to them, checking all suspicious claims. Others, either because orders were the first consideration or simply because of general looseness in the management, have taken business pretty much as they found it. Most students of marketing will agree that abuses in the field of customer classification are both common and difficult to cure. From the sellers' standpoint they mean both lost income and irrita-

tion in the trade. From the buyers' standpoint they mean a disorganized competitive situation at the next distributing level. Now, when a *bona fide* retailer, who lets the world know that he is that and nothing more, has to face the competition of another retailer receiving wholesale discounts, neither amity nor economics seem to be very well served. One of the dearest ambitions of many trades and industries during N.R.A. days was to clear up this "Classification Mess" as they regarded it. Their plans usually broke down, not on lack of sympathy in officialdom for efforts to thwart misrepresentation or ignorance, but on their insistence that rigid customer classes be made mandatory and not merely educational.

As soon as the beginnings of a trade practice policy emerged, N.R.A. was found unwilling to go so far, but the issue of more exact customer definitions has lingered on. Its sudden appearance here as a possible indirect requirement of the Robinson-Patman Act is interesting both in itself and as an unusually apt illustration of the extent to which close legal control over the details of a business can produce by-products as well as primary crops. Some will be good and some bad, but which and how much of each is scarcely knowable in advance.

An attractive by-product of this particular by-product is promised, according to present indications, by the increased knowledge about customers that sellers will be forced to acquire. The point need not be labored as its implications are clear from the consideration of customer classes and trade discounts presented above. The interesting corollary however is that quite a number of manufacturers are now making special investigations of their customers, or having them made for them, to find out whether they have been properly classified in the past. Their theory in doing this comes in three parts: (1) they will catch enough cases to more than pay for the cost of the examination in discounts saved, (2) at the same time they will be avoiding one of the perils of the Robinson-Patman Act, and (3) it's a good idea anyway.

Protection by Certificate

Many sellers and buyers are requiring assurances of each other that the transactions in which they mutually engaged do not trespass the law. Buyers have printed on their order blanks notations to the general effect that "it is understood the prices at which these goods are being sold do not contravene the Robinson-Patman Act."

Some manufacturers, worried over their disorderly customer lists, have likewise stipulated on their invoices that "these prices are given on the condition that the goods in question are not directly resold at retail." Some sellers are requiring formal assurance from brokers that they are not representing buyers and that no part of the commission paid them will go to the other party to the transaction.

Avoidance of the Law

Mention of avoidance immediately brings the by-product aspect of law-making back to mind. It is one of the most important of all and one of the most uncertain in its ultimate consequences.

Material for consideration under this heading is both rich and speculative, and a little too much so of both for condensed treatment. To give it a setting and for the sake at least of an interesting argument it might be said that the elementary purpose of the Robinson-Patman Act was to help independent wholesalers and retailers while the chances of lawful avoidance are slightly in favor of mass distributors. This tentative proposition is laid down on the assumption that the law can be avoided by such maneuvers as integration of manufacturing and distribution, the contracting by mass distribution for the entire output of small manufacturers, the further development of private brands, and the consolidation by mass distributors of their retail unit purchases where these have hitherto been too decentralized to claim economies permitted under the Act.

Extensive integration of manufacturing and distribution would obviously narrow the law's application, and to that extent deprive some types of retailers, wholesalers, and national brand manufacturers of its expected benefits. How much increase in this modern development we are going to see is still speculative. It deserves nevertheless to be recorded among the current effects of the Act that in attitude at least chain stores and mail order houses are giving an increased amount of attention to the possibilities. Unsubstantiated reports that they have here and there carried their interest to the point of actual new investment are not uncommon, and doubtless some of it has happened. Part of this new activity may be strategic only, for the purpose of preventing suppliers from at least leaning backward in their efforts to comply with the law. Some of it may be straight dollars and cents business calculation. A part of it is surely impulsive, bred by irritation with the law and an angry determination to be free of its restrictions. It does not follow that all of these new developments will be profitable or permanent. Both manufacturers and distributors have stubbed their toes in the past by walking too blithely into the other fellow's domain, and can easily do so again. This is theoretical and belongs to the future. The point of immediate interest is that the Robinson-Patman Act has supplied a fillip to such ambitions and that it shows signs of having some effect. Mr. Patman's own recognition of this danger is evidenced by his interest in an additional law to prevent manufacturers from selling at retail. Co-operatives and voluntary groups are feeling the same urge. As they are organized for the most part in the interest of their wholesale and retail members, it might be inferred that independents will thus be able to keep step with the mass distributors and nullify this particular advantage. The difficulty is that the co-operatives, with their less fully co-ordinated managements, will hardly be able to bind all of their units to these expensive ventures as freely as can the corporate institutions.

Possibly more dangerous to the intentions of the law and to independent retailers and wholesalers is the threat of full output contracting by mass distributors. Here again business is faced with the possible expansion, under a law to save small merchants, of large scale operations. This solution disposes of the worries of cost

allocation, algebraic distribution of advertising allowances, and the other minutiae of justice with which the law concerns itself. There is but one buyer and one seller.

It might be argued that size is size and that if a chain or mail order house can swing so big a contract, so can the voluntary and co-operative. The flaw in this argument likewise lies in the poorer cohesion of the co-operative units. The members of the co-operative organization are still primarily individualists who have surrendered a certain measure of independence to the common good but will always retain enough of it, together with distinctive local needs, to make them shy of headlong commitments. Their mass distributing neighbors will, in the parlance of the day, not have any such problem of reserved powers, so that whatever their head offices say ought to be done for the system as a whole has a moderately better chance of being done.

Probably the most talked about new issue touching the effect of the Act on competition between mass distributors and independents is the extent to which it will give new life to private brands. These had experienced a considerable growth up to and during the depression. They are obviously of deep significance to the whole merchandising world. If the law "cracks down" too sharply on the price advantage which private label owners have been enjoying over national brands, additional incentive would be supplied to such owners to turn to exclusive sources for their supplies where no problem of discrimination could enter. A second and even more important result might occur in the mass distributing outlets themselves. Heretofore advertising allowances have operated as a check on private brands to the extent that they supplemented profit margins resulting from the quantity purchases of national brands. If these are now heavily curtailed it is not unreasonable to expect that intensified point-of-sale pressure will be thrown by these distributors behind their own labels. Some chain stores have already made clear their ability and readiness to meet the new challenge by such a shift of emphasis. It does not follow that the choice will be a completely free one. National advertisers know how to fight for their markets, and whatever funds are released by the curtailment of advertising allowances can be thrown into either enlarged advertising appeals to consumers or into lower prices. Instances of such reprisals are already known. In fine, the whole broad expanse of this traditional struggle has been newly agitated by the Robinson-Patman Act, and the outcome may be at once one of the most important effects of the new legislation and one least foreseen by its enactors.

One of the most interesting but more speculative consequences of the law may be the development of conversion contracts. Under this form of contract the buyer makes his own purchases of raw materials and turns them over to the manufacturers for processing. Title does not pass and presumably there is no sale of commodities to which to apply the law. In another sense a manufacturer merely rents out his processing facilities to the mass distributor. This procedure involves technical difficulties that somewhat belie its apparent simplicity and may not completely escape

the reach of the law. Much depends upon the amount of respect shown by the courts to Congress's intention to outlaw "indirect" discriminations as well and to make the word "indirect" means a good deal. Resort to this device by one or two large companies has been reported to the writer, and that there is a good deal of interest in the possibility is attested by the number of inquiries being made in various quarters concerning it. However, it is doubtful if many contracts have been actually written.

It is quite clear from the above discussion that reactions to the Robinson-Patman Act are as wide and diversified as business itself, and that furthermore many of the adjustments now being made are tentative and experimental. Sellers must make their guesses as to the meaning of the law's specific restrictions, and will ultimately consult their own interests and prejudices in choosing from among the various interpretations offered. These judgments will be further conditioned by buyers' pressure. Still further, when sellers act buyers will react, so that there will inevitably be give and take within and at least slightly over the boundaries of the law before any new set of usages takes hold.

III. THE CONSERVATIVE OUTLOOK

A great deal of attention has been paid in this article and generally to the unusual number of "degree" problems with which this law abounds. The theory of most of the law's tests, as has been seen, is that there are invisible points beyond which normally healthy practices become harmful. Irritating though these problems are, it is the feeling of many observers that they are not necessarily fatal. Arbitrary distinctions between "degrees" are not at all novel to the law. The history of the Anti-Trust Laws is replete with them and the writing of meanings into and out of statutes and constitutions for better or worse is now standard jurisprudence. Perhaps never has the exercise of this judicial privilege been more heavily dramatized than in the recent Washington Minimum Wage Law and Wagner Labor Relations Act decisions.

The degree argument in the case of the Robinson-Patman Act can therefore be overdone. One of the risks in analyzing a regulatory law, however impartially, is that in admitting the administrative and interpretive problems of bracketing degrees of difference where no natural dividing lines exist, too much blame is laid on that particular law. Much of the difficulty lies in the nature of law itself, as a social and not always flexible instrument designed to keep surging human affairs in less disorder than they would otherwise be.

When Congress gets in one of its impulsive moods with reference to a semi-scientific subject such as distribution, generalities can conceivably be less dangerous than too much precision. In such situations, for it to express all of its passing emotions in finite rules might be rigidifying beyond all tolerance and safety. Also, out of a welter of things to stipulate, it would be easy to the point of likelihood for it to pick on the wrong ones. For instance, it might have insisted in so many words that advertising allowances should be sprayed over the market in exact proportion

to money sales, unaware or unmindful of the major injustices that would have to be suffered by commerce to produce the minor justice. Or that loss of three accounts by one seller to another should be proof of injury to competition. Most legislative proposals have at least a modicum of plausibility in them. It is only human nature to think of an entire situation in terms of the aspect that one is sympathetically viewing at the minute, and legislators are no exception. The result, of course, in the improbable event of complete lack of restraint, could be perfection by inches and distortion by the yard, after the fashion of the tailor who makes the suit look fine in front by gathering in the back.

At any rate the courts probably have the power to whittle down this particular law to dimensions and areas of application that most men will consider reasonable. They may choose to ignore minor infractions through a strict interpretation of what constitutes "injury." It is conceivable for example that disparities in credit terms will be disregarded unless there is unmistakable evidence of their consistent and deliberate use to bestow advantages on certain customers; that functional discounts will escape challenge unless out of all reason; that there will be no insistence on fine spun diffusion of advertising allowances; that the occasional and incidental violation will be regarded as without meaning or economic effect.

Legislation by judicial distinction between degrees therefore has something to be said for it, particularly in restless times. Congress filled this law with vague terms, which bewildered everyone but at the same time saved them from some myopic particulars that could have been even more embarrassing. As matters now stand, it is left to the more deliberate judgment of the courts to write equity into the new standards. Such a complete division of labor in law making may not have been exactly what the Fathers had in mind, but this time Congress invited it.

And this time the power to resolve uncertainties may turn out to be the power to save the good in the Act, as has happened more than once. A few conservative decisions could divert business men's attention from the welter of detail that now torments them and bring it back to respectful and sympathetic regard for the law's understandable purpose. Even in this fuzzy period between the passage of a startling law and its clarification critics recognize that there is quite a difference between fulfillment of that purpose and a hypercritical application to every possible situation. The second may come in time but the first does not have to wait on it. In spite of all the posing of ridiculous and possible problems with which the law's literature to date has been so rich, one can go further and say that not even yet have all possible causes of action been thought of. Nor will this process of individual experience and challenge run its course until long after business has selected for itself a set of practical assumptions, based on early court decisions and its own idea of the kind of justice that the law intends, and in the main settled down.

What the processes of democratic law making can do to a principle is always fascinating but those so inclined are still justified in keeping their attention fixed on the main idea.

THE COURTS AND THE ROBINSON-PATMAN ACT: POSSIBILITIES OF STRICT CONSTRUCTION

JAMES ANGELL MCLAUGHLIN*

So much has been written concerning the construction of the Robinson-Patman Act in the light of its history in the halls of Congress that further discussion might seem sterile until authoritative interpretations are forthcoming. Comparatively little attention has been paid to the broader background of legislation directed toward the end of trade regulation and to the treatment of such legislation in the courts. The outstanding fact is that the courts have consistently resisted all pressure to construe such legislation in any manner which does not preserve to the business man wide latitude to conduct his business and to the courts wide latitude to direct legal restraint with reference to judicial concepts of the proper sphere of government and with reference to judicial instincts concerning public policy.[1]

A quarter century ago Mr. Justice Harlan trembled for the safety of our institutions, because the Sherman Law had, for the first time, just been declared to prohibit only unreasonable restraints of trade.[2] The *Standard Oil* decision marked a frank recognition of the fact, repeatedly denied in earlier opinions, that the broad language of the Sherman Law would be applied only within reasonable limits. No machinery for determining the limits was available except judicial judgments founded to a large extent on silent major premises. State laws were either forced substantially into the mould of the Sherman Law or declared unconstitutional.[3] Agitation after the *Standard Oil* opinion led to the exploration of uncharted fields and some federal legislation resulted in 1914.[4] But those who supposed that the Federal Trade Commission, then established, could develop new law on matters of major public policy were due to a rude awakening. The courts emphatically announced from the outset

* A.B., 1912, University of Michigan; LL.B., 1916, Harvard University. Member of the Illinois Bar. Professor of Law, Harvard Law School. Author of *Cases on the Federal Anti-Trust Laws*. Contributor to legal periodicals.

[1] The thesis that substantially all legislation in this field is either declaratory or unconstitutional has been developed with manifold illustrations. See Montague, *Proposals for Revision of Anti-Trust Laws*, in HANDLER, THE FEDERAL ANTI-TRUST LAWS, A SYMPOSIUM (1932) 23.

[2] See Standard Oil Co. of N. J. v. U. S., 221 U. S. 1, 105 (1911).

[3] International Harvester Co. v. Kentucky, 234 U. S. 216 (1914); Cline v. Frink Dairy Co., 274 U. S. 445 (1927); Fairmont Creamery Co. v. Minnesota, 274 U. S. 1 (1927); Williams v. Standard Oil Co., 278 U. S. 235 (1929); and see Montague, *supra* note 1, at 39-48.

[4] The Federal Trade Commission Act of Sept. 26, 1914, 38 STAT. 717, and the Clayton Act of Oct. 15, 1914, 38 STAT. 730.

that they, not the Commission, were to declare the law[5] and the Commission was driven chiefly into the pursuit of "the small dishonesties of trade"[6] and the search of information, with narrowly limited powers to collect such information as might not be readily forthcoming.[7] It did help to mould the law of resale price maintenance,[8] for what it may be worth,[9] but the meaning of the Anti-trust Laws continued to be determined by the Supreme Court and, as an auxiliary agency for the enforcement of the law so determined, the Commission was compelled to assume a very minor rôle.

No exception was made with reference to the Clayton Act, which was the companion of the Federal Trade Commission Act. Indeed, the history in the Court of the Clayton Act, to which the Robinson-Patman Act is most closely linked, may be regarded as the key to the present situation. The *"Magna Charta"*[10] of labor contained in that law was found to comprise only innocuous abstractions or provisions "merely declaratory of what was the best practice always."[11] The section against tying clauses was employed to check a growing practice on the part of patentees to extend their monopolies into unrelated fields,[12] but, otherwise, strict construction ruled.

A section of the Clayton Act prohibited stock acquisition where the effect might be to lessen competition substantially "between the corporation whose stock is so acquired and the corporation making the acquisition."[13] This, on its face, is in contrast to the other passages in the Act which refer to lessening competition or tendency to create a monopoly *in any line of commerce.*[14] It would thus appear that, where one corporation acquires control of another corporation with which it has been in competition as to a substantial part of its business, competition would be lessened substantially between the two corporations. Attention is directed to the two corporations as a closed system with reference to which the substantial character of the

[5] The leading case is F. T. C. v. Gratz, 253 U. S. 421 (1920). Reaffirmations of this announcement in the Circuit Courts of Appeals have been too numerous to warrant citation.

[6] Mr. Justice Holmes used the quoted words. In their context they suggest that calmness slightly tinged with scorn which is sometimes known as Harvard indifference. See Nash v. U. S., 229 U. S. 373, 378 (1913). By 1930 over 90% of Federal Trade Commission complaints charged false advertising, false branding and the like. See Watkins, *Federal Trade Commission and the Anti-Trust Laws,* in HANDLER, *op. cit. supra* note 1, at 113. The proportion has tended to increase rather than decrease.

[7] F. T. C. v. Am. Tobacco Co., 264 U. S. 298 (1924); F. T. C. v. Claire Furnace Co., 274 U. S. 160 (1927).

[8] Pursuant to its victory in F. T. C. v. Beech-Nut Packing Co., 257 U. S. 441 (1922).

[9] For a brief summary of the leading cases and the economic bearing of the law, see discussion by McLaughlin at Round Table Conference on Law and Economics (1929) 19 AM. ECON. REV. SUPP. 56.

[10] Samuel Gompers used this expression about §6 of the Clayton Act. See *Charter of Industrial Freedom* (1914) 21 AM. FEDERATIONIST, 957, 971; FRANKFURTER AND GREENE, THE LABOR INJUNCTION (1930) 142-143.

[11] *Per* Taft, C. J., discussing §20 in Am. Steel Foundries v. Tri-City Central Trades Council, 257 U. S. 184 (1921).

[12] See Motion Picture Patents Co. v. Universal Film Mfg. Co., 243 U. S. 502, 515 (1917); Note, *Repudiation of Patent Protection by Extension of §3 of the Clayton Act* (1931) 40 YALE L. J. 954.

[13] §7, 38 STAT. 731 (1914).

[14] The reference to the line of commerce occurs in §7 in connection with tendency to create a monopoly as distinct from lessening competition and occurs in §§2 and 3 in both connections.

effect is to be gauged. It would appear unnecessary that the effect be substantial compared with the entire volume of the "line of commerce" throughout the United States. Such a construction would carry out the theory upon which this portion of the Clayton Act was passed—that it is sound policy to nip trusts in the bud by prohibiting certain peculiarly invidious or potent methods of eliminating competition, and so to arrest the growing power before it reaches the stage where substantial impairment of the competitive structure of a "line of commerce" has already been achieved.[15] The Supreme Court, however, not only ignored the construction outlined, but upset an order of the Federal Trade Commission which was based upon substantial evidence that competition in the entire shoe business had been lessened substantially.[16]

Section 2 of the Clayton Act,[17] which is amended by Section 1 of the Robinson-Patman Act, has also been narrowly construed. A Circuit Court of Appeal delayed its operation for years by erroneous reference to legislative history.[18] Eventual correction of this error of law by the Supreme Court[19] led to the recovery of substantial damages founded upon serious price discrimination,[20] but the section has never been given any extensive application. The most conspicuous case of local price discrimination evidencing monopolistic price control has been the "Pittsburgh Plus" system of delivered prices in the steel industry, but the Federal Trade Commission deemed it wise to accept an inglorious compromise when its order to abandon the practice was only complied with so far as the United States Steel Corporation deemed "practicable."[21] Complaints that the section is innocuous because of weakening provisos confront the fact that a state statute which flatly forbade price discrimination was declared unconstitutional.[22]

An undertone of adverse criticism may be thought to accompany the foregoing broad summary of the decisions in the background of the Robinson-Patman Act. The time and the occasion may arise when something must be done to curb judicial dominance in the field in question. But whether or not the time has come, it is submitted that the Robinson-Patman Act does not offer the occasion. Desirable as

[15] See Wooley, J., dissenting in Temple Anthracite Coal Co. v. F. T. C., 51 F. (2d) 656 (C. C. A. 3d, 1931); HENDERSON, FEDERAL TRADE COMMISSION (1924) 39; MCLAUGHLIN, CASES ON THE FEDERAL ANTI-TRUST LAWS (1933) 301, n.94, 315, n.99.

[16] International Shoe Co. v. F. T. C., 280 U. S. 291 (1930). Mr. Justice Stone's dissent and the discussion of the evidence in the Court below seem more convincing. See 29 F. (2d) 518 (C. C. A. 1st, 1928).

[17] *Supra* note 4.

[18] Mennen Co. v. F. T. C., 288 Fed. 774 (C. C. A. 2d, 1923); National Biscuit Co. v. F. T. C., 299 Fed. 733 (C. C. A. 2d, 1924). Both decisions probably arrived at the right result, however, since the functional discounts of the Mennen case and the quantity discounts of the National Biscuit case both seem proper.

[19] Van Camp & Sons v. Am. Can Co., 278 U. S. 245 (1929).

[20] Am. Can Co. v. Ladoga Can Co., 44 F. (2d) 763 (C. C. A. 7th, 1930) *cert. denied*, 282 U. S. 899 (1931).

[21] F. T. C. v. U. S. Steel Corp., 8 F. T. C. 1 (1924); FETTER, MASQUERADE OF MONOPOLY (1931) 158; Note, *Legality of Basing-Point Systems* (1932) 45 HARV. L. REV. 548; N. R. A. REPORT, OPERATION OF THE BASING-POINT SYSTEM IN THE IRON AND STEEL INDUSTRY (1934); FED. TRADE COMM'N, BASING-POINT SYSTEM IN THE STEEL INDUSTRY (1935); BURNS, THE DECLINE OF COMPETITION (1936) 299-322.

[22] Fairmont Creamery Co. v. Minnesota, 274 U. S. 1 (1927).

the Sherman Act may be, the point of view of the business man is intelligible when he complains of having the uncertainties of law added to the difficulties of making pressing business decisions. There is even some force to his complaint when the problem confronted is a merger or a trade association program directed toward the mitigation of "cutthroat competition" or "disorderly markets," but a decision to merge may be made only once in a corporate lifetime and in most cases the danger zone in trade association activity may be avoided by him who is really ready to accept the clearly announced principle that monopolistic control of markets is only to be allowed under government supervision. The greatest pressure to which the modern business man is usually subjected, however, is the pressure to sell his goods. Conditions change, markets shift, customers switch and the risk of not being able to meet his payroll may necessarily overshadow all fears of legal interference with his accustomed liberty to make his sales as best he can. Force, fraud and conspiracy he knows he must avoid. But to make allowances to customers only on "proportionally equal terms"! No one can tell him how to do that and, if he makes no allowances at all, he is going to lose business to his bolder competitors.

The impractical vagueness of the law which may confront the seller at every turn in a long business day renders it an outrageous basis for a suit for triple damages. The triple damage suit was devised to inculcate the fear of the Lord into the predatory trust. It may not apply to the Robinson-Patman Act at all,[23] but the general impression that it does so apply can scarcely operate to warm the welcome with which that loosely knit enactment is received in the courts.

The history of the Act as an anti-chain store bill[24] is not in its favor. It represents a raid by selfish interests attempting to uphold obsolescent and inefficient methods of distribution against the chief contribution of the current generation toward making the purchasing power of the masses effective. Its proponents align themselves with those short sighted agitators who from time to time have opposed the introduction of labor saving machinery.[25] It further represents a generalization from a small amount of data—the typical error of the business man thinking of all creation in terms of his trade. Upon the analogy of the *Van Camp* case[26] it may well be thought that the great bulk of the references to the immediate Congressional history of the Act will be properly held inadmissible. In view of all these considerations it seems worth while to explore the possibilities of strict construction.

We shall first direct our attention to Section 1 of the Act, constituting Section 2 of the Clayton Act as amended. It may first be noticed that the Act does not prohibit differences or differentials in price, although Congress showed its consciousness of the availability of the two last mentioned words by employing them in one of the provisos of the paragraph. What the statute does prohibit relates to discrimination in price. Now discrimination is a word that has an offensive connotation. Consequently, if

[23] See *infra* p. 419.
[24] See SEN. DOC. No. 4, 74th Cong., 1st Sess. (1935); (1936) 50 HARV. L. REV. 106.
[25] See Burns, Book Review (1937) 46 YALE L. J. 909, 911.
[26] *Supra* note 19.

the court finds that the price differences are not undue or are only reasonable, it may hold that such differences constitute no discrimination. Provisos shortly to be discussed which specify circumstances in which discrimination may be lawful obviously do not preclude this construction. It may next be noticed that discriminations in price are only prohibited between purchasers of like grade and quality. Consequently, if the grade and quality differ even though the price difference may be so large as to suggest a discrimination, such a discrimination is not within the letter of the Act.[27]

Section 2 of the original Clayton Act applied to all sales in *the course of* interstate commerce. Under this provision discrimination in local sales which directly and substantially affected interstate commerce was unlawful. The additional requirement has been added that one or more of the purchases be *in* interstate commerce, thus suggesting that discrimination in local sales is excluded, whatever the effect. Reference to the *course* of commerce suggests the concept of the *flow* of commerce which has been frequently used to tie local transactions in with interstate transactions. The more specific added language may serve only to restrict the broad application of this concept, although only a background favorable to strict construction would induce such a fine spun argument.

The language of the statute admits of outright sabotage of the intention which would be usually attributed to the use of such words in ordinary conversation. It applies only to goods sold for use, consumption or resale in the United States. If chattels are sold without any specification of the purpose for which they are used, then they are not literally *sold for* use, consumption or resale within the United States. Even if the buyer contemplates using them or selling them in the United States, that is no concern of the seller. The articles are sold outright and not for any limited purpose. They may be *bought for* use, consumption or resale within the United States, but that is irrelevant. The fact that this argument has not been applied to the old Clayton Act would not exclude its application here if the new Act seems more drastic in other respects.

Even if there is a difference in price amounting to an undue or unreasonable discrimination where goods of like grade or quality are sold across state lines under stipulations that they be used or resold in the United States, there is no violation of the Robinson-Patman Act unless the old tests of Section 2 about substantial lessening of competition or tendency to create a monopoly are satisfied or unless the effect may be to "injure, destroy or prevent competition" with any person who either grants or receives the benefit of the discrimination. Note that it is only when the effect upon competition with the parties or their customers is drastically affected that this last clause is satisfied. Competition is rarely "destroyed" or "prevented." These words are in marked contrast to the phrase "substantially lessen" which is

[27] It may be doubted whether this marks any practical change from the Clayton Act, since it would be difficult under either law to establish discrimination between the purchasers of different grades of merchandise. See McLaughlin, Book Review (1937) 23 VA. L. REV. 860, 861.

carried over from the old Clayton Act. Even the word "injure" is a comparatively harsh word, and, with the application of the maxim *noscitur a sociis*, it may readily be construed as referring only to a high degree of impairment. If Congress intended to cover discrimination which simply impaired competition, it might readily have said so. On the whole it is easy to conclude that proof of injury, destruction or prevention of competition within the meaning of the Robinson-Patman Act will be adduced so infrequently that the clause in question does not substantially extend the area covered by the Clayton Act.

Coming now to the provisos, it may be observed that provisos cannot add to the positive provisions of the principal clauses or paragraphs to which they are annexed without violating an elementary principle of statutory construction. Most of the provisos in this law may be safely disregarded as merely declaratory of lawful differences in price which would not violate the law in any case. They cannot legitimately be construed to enlarge the law by negative inferences. The clause purporting to give power to the Federal Trade Commission, however, to fix "quantity limits" above which further quantity discounts will not be allowed is not a proper proviso. It will probably be accepted as an attempt to add to the substantive law. Such limits are to be set with reference to differentials which make only due allowances for differences in cost. In order to set such limits the Federal Trade Commission must find either that such a differential is "unjustly discriminatory" or "promotive of monopoly." A finding that a differential based upon cost is "unjustly discriminatory" would not be sustained by any court adopting the strict views here predicted and here recommended. It would be difficult to sustain on any theory. A finding based upon a theory that the larger discount is "promotive of monopoly" might have to be taken seriously, if based upon evidence. That problem may be faced when it arises. Only the most extensive proceedings could afford an adequate basis for an administrative order of this sort and a defendant would have ample opportunity to adapt himself to the new situation, if the evidence were going against him. This is not the sort of question that is causing business men present worry under the Robinson-Patman Act. There is no threat of triple damages involved.

Paragraph (b), placing upon the person charged the burden of justifying a discrimination proved at "any hearing on a complaint under this section," refers only to proceedings before the Federal Trade Commission. Pursuant to the Conformity Act, actions for damages would be started by declarations in some districts and by petitions in others and by pleadings bearing other designations in others, and it cannot be supposed that the law is to depend upon the names employed in the different jurisdictions. Furthermore, the sole specified consequence of failure to rebut a *prima facie* case is that the Federal Trade Commission may issue an order to terminate the discrimination.

Paragraph (b) tends further to strengthen the argument that price differentials under paragraph (a) are not unlawful so long as they are not discriminatory because unreasonable or otherwise against public policy. For the burden of justifying a dif-

ferential upon a quantitative basis under the principles of cost accounting is utterly overwhelming and subversive of legitimate business practice. Cost accounting is not and cannot be an exact science. Fixed costs and variable costs incurred at the same time in connection with various products or various aspects of a business cannot be distributed in any manner demonstrably correct. A wide latitude must be allowed within which business judgment is to determine what accounting system to use and what discount policy to follow pursuant to the system chosen. If it be borne in mind, however, that no case is made out until a difference is shown to be *prima facie* unreasonable or against public policy, then the provision with reference to rebutting the *prima facie* case becomes declaratory of sound existing practice and consistent with the reasonable freedom to pursue a lawful calling associated with the Bill of Rights. In any event it must be clear that paragraph (b) is not an independent section of the law, but a mere subdivision of Section 2 of the Clayton Act as amended. It should be read in that context and, consequently, unless all the hurdles set up in that paragraph are cleared, paragraph (b) does not come into operation.

The last observation applies with reference to paragraphs (e) and (f), for the latter, subjecting the knowing beneficiaries of discrimination to liability, expressly refers to the rest of the section and paragraph (e) relates only to discriminatory differences in services furnished by the seller. Payments, not discriminations, are the subject of paragraphs (c) and (d), the former being directed against "dummy brokerage" payments and the latter against advertising allowances and the like when not available to all customers on "proportionally equal" terms. Consequently, although these paragraphs should be construed *in pari materia* with paragraph (a), the rule of reason or the discretionary control of the court based upon the suggested construction of the word "discrimination" does not there operate. It is not to be assumed, however, that all payments without consideration or all allowances made customers on terms which are not equivalent are to be unlawful. The policy of the Act is indicated in paragraph (a)—to protect various aspects of competition, and, unless one of the undesirable effects specified in paragraph (a) is established, the paragraphs probably have no operation.

Paragraphs (d) and (e) are vulnerable in that they fail to set up any workable or intelligible standards for determining the meaning of the requirement that payments made or services furnished by sellers be open to all customers on "proportionally equal" terms. No guide is given concerning the variables that go to make up the proportion. Proportional to what? To the number of units sold? To the price? To the number of outlets commanded by the purchaser? To the need of the seller or purchaser for the particular sort of activity presumably promotive of distribution? If a seller gives a thousand lines of advertizing to the purchaser of a million units, is he to give a line in the classified section to the purchaser of one thousand units? If he furnishes a demonstrator to the big purchaser for one thousand minutes is he to furnish a demonstrator to the little purchaser for

one minute? He can scarcely furnish one-sixtieth of a demonstrator for an hour. Is it even clear that a straight arithmetic proportion is specified? How about geometric proportions? And upon what basis are the exponentials to be calculated?

The formal absurdity of the phrase "proportionally equal" has not yet been faced. If W is to X as Y is to Z, the four quantities form a proportion and the two ratios are equal. Generally no two variables in a proportion are equal, however, for if any two of them are equal, the expression reduces to an identity, which suggests the immediate abandonment of the proportional form of statement. If W equals X, a simple fact becomes an abortive horror by calling the quantities "proportionally equal." It would serve Congress right, if the courts flatly refused to have commerce with paragraphs simply not within any known language. A more likely result, though, is that the paragraphs will be allowed to stand as if Congress had required services or allowances to be roughly equivalent in view of all the circumstances. Even without the bulwark of a written Constitution, judges will decline to attempt the impossible.[28] If there is no way of telling whether allowances are equivalent in view of all the circumstances, there is no way of finding a violation of the law.

It has generally been correctly assumed, it would seem, that Section 3 of the Robinson-Patman Act includes the only criminal provisions in that statute. At first glance the section would appear to be clearly unconstitutional. It is striking that this criminal provision lacks most of the qualifications and provisos that modify the paragraphs which carry only civil liability. To require equal discounts upon all sales involving like grade, quality and quantity would be to attempt to interfere with all private mercantile business in the same extensive manner that the law interferes with common carriers.[29] The idea advanced with reference to paragraph (a) of Section 2 of the Clayton Act as amended, that the word "discrimination" is itself used only in an offensive sense does not, at first glance, apply with equal force to Section 3 of the Robinson-Patman Act. The former paragraph forbids discrimination *where,* etc., thereby indicating that the following language operates to limit the prohibition of the Act to those discriminations which, among many kinds of discriminations possible, satisfy the then following specifications. It makes no effort to define the sense in which the word "discrimination" is used. Section 3, on the other hand, forbids a sale which discriminates *in that,* etc., thereby inferentially expanding the concept of discrimination so as to include all unequal discounts. This intolerable construction might be avoided in various ways. The inferential definition might be frankly disregarded in the interests of constitutionality or the qualifications with reference to predatory motive in the last clauses of the paragraph might be carried back over a semicolon to modify the concept of discrimination employed in the first part of the section.

It does not follow, of course, that those who share the view that the Robinson-

[28] Statutes requiring the valuation in bankruptcy of contingent claims afford many examples, *e.g.,* Robinson v. Ommanney, 21 Ch. D. 780 (1882) (covenant not to revoke a will); Vint v. Hudspith, 30 Ch. D. 24 (1885) (possibility of having to pay costs to assert a legal right); *Ex parte* Linton, 15 Q. B. D. 239 (1885) (future liability for alimony). See WILLISTON, CASES ON BANKRUPTCY (1915) 481 n.

[29] *Cf.* §2 of the Interstate Commerce Act, 41 STAT. 479 (1920).

Patman Act should, will and must be narrowly confined by the courts need conclude that the Act may be ignored. It will be a question whether intolerable effects of the Act should be met by frontal attacks or by evasion. One thing is quite clear. Attorneys cannot ethically advise their clients to evade the Act by lying. As one writer has suggested, there is no way to stop a seller from losing a hole in a golf match to his favorite customer.[30] But checks can be traced and caddies and locker men may talk in a most irresponsible way about cash payments. Serious risks are incurred with any sort of false invoicing. The hurdles overcome by the plaintiff in the *Ladoga Can* case[31] and its substantial recovery may be attributed in a large degree to the effect upon the court and jury of disingenuous conduct on the part of the defendant. A seller should supply himself with figures to give plausible accounting support to whatever discount policy he elects to pursue and should, if possible, promote that policy without attracting the attention of the legal ambulance chasers that will try to fatten on a harvest of triple damage suits.

On the whole, present indications are that the Federal Trade Commission can be relied upon to discredit the Act. Instead of endeavoring to find flagrant discriminators and to bring a few cases that might appeal to the courts, it has gone ahead without any signs of intelligent discrimination itself. Although no comprehensive information is here available, present indications are to the effect that these suits are badly chosen,[32] and some, at least, are badly prepared and are being badly presented before the Commission.[33] The large number of reversals of Federal Trade Commission orders that it is to be anticipated will encourage sellers to restore flexibility to their discount systems to such an extent that government enforcement of the law according to the construction of the sponsors of the Act would be a physical impossibility. The impracticability of such constructions must be soon made apparent to the courts in any event, but a good crop of reversals of Federal Trade Commission orders will accelerate the process of putting the Act in its proper place.

The courts can, of course, tend to the civil damage suits, not only by strict construction of the substantive law along lines similar to those here suggested, but also by requiring the plaintiff to demonstrate the causal connection between the alleged discrimination and the damages he claims. In most cases this is insusceptible of proof. Civil damage suits under the Anti-trust Laws have been, in general, abortive for this reason.[34] The Supreme Court opened the door to such suits a few years ago in a case where the plaintiff had suffered to an indeterminate extent from grossly predatory conduct. He was allowed to have a jury guess at his damages upon the theory that it was the defendant's fault that created the situation and that the defendant might accordingly have to bear the risk created by his act.[35] This door can

[30] See Engel, *The Patman Bill and Advertizing*, ADVERTIZING AND SELLING, July 2, 1936, pp. 25, 50.

[31] *Supra* note 20.

[32] The discounts attacked in the matter of Kraft-Phenix Cheese Corp., Docket No. 2935, seem eminently reasonable.

[33] The record in the matter of Bird and Son, Inc., Docket No. 2937, seems to be a model of how not to prepare and try a case.

[34] See McLaughlin, *op. cit. supra* note 15, at 37, 38, n.117, 569, n.179.

[35] Story Parchment Co. v. Paterson Parchment Paper Co., 282 U. S. 555 (1931).

readily be closed, if suits for civil damages under the Robinson-Patman Act become a great source of wealth for speculative litigants.

If the courts are sufficiently impressed with the folly of subjecting a business man to the risk of triple damage suits every time he sells a bill of goods, the way lies open to a holding that there is no provision for such suits under the statute. Section 4 of the Clayton Act[36] provides for damage suits under the "Anti-trust Laws," which are defined in Section 1[37] to include the Clayton Act, but they are nowhere defined to include the Robinson-Patman Act, amendments to the Clayton Act or the Clayton Act as amended. The Robinson-Patman Act, itself, not only fails to provide for suits by private parties but contains several other specific references to remedies. This invokes the principle that when a statute creates new rights or duties, the statutory remedies shall be exclusive. Thus, taking the sections of the Act in reverse order, Section 4, relating to dividends by cooperative associations, is an innocuous saving clause. Section 3 is clearly criminal only. Section 2 purports to deal only with the effect of the Act on past and pending Federal Trade Commission proceedings. The first section, amending Section 2 of the Clayton Act, contains, as we have seen, paragraph (b), which seems clearly to contemplate Federal Trade Commission proceedings only. The ambiguous new paragraphs making no references to procedure follow in its wake. The most conspicuous change in paragraph (a) purports only to confer new powers on the Federal Trade Commission. That paragraph is otherwise silent concerning procedure. Construing the entire Robinson-Patman Act by its four corners and reverting, if desired, to the "mischief to be remedied"[38] and finding its source in a Federal Trade Commission investigation,[39] it may be fairly urged that civil suits are unambiguously without the scope and without the contemplation of the Act.

Adoption of a few of the bolder strict constructions here suggested would render the Act so innocuous as to remove all occasion for further strict construction pursuant to the rule in Lord Cholmondeley's case.[40] Trimming the Act into a workable pattern of commercial law may be achieved in a variety of ways. There is more doubt about the itinerary than about the destination. It seems safe to conclude that before long the harassed seller may be assured that cease and desist orders ain't a-goin' to rain no mo', for

> The F. T. C., with R. P. wings,
> Might soar to winged fame,
> But C. C. A.'s, that have no wings,
> Can clip them just the same!

[36] 38 STAT. 731.

[37] 38 STAT. 730.

[38] For a modern reference to this quaint test, see Atlantic Cleaners & Dyers, Inc. v. U. S., 286 U. S. 427, 435 (1932), *per* Sutherland, J.

[39] Investigation of chain stores pursuant to SEN. RES. No. 224, 70th Cong., 1st Sess. (1928). See particularly SEN. DOC. No. 89, 73rd Cong., 2d Sess. (1933). See also *supra* note 24.

[40] Lord Cholmondeley was an apocryphal character who worried so hard he lost his memory and, losing his memory, forgot to worry.

Br
Br

Br

Ce
Ch

ref

INDEX

PRICE DISCRIMINATION AND PRICE CUTTING*

---

* As used in this Index, the abbreviation "R-P Act" refers to the Robinson-Patman Act.

DUKE UNIVERSITY SCHOOL OF LAW

FACULTY, 1941

ROBERT L. FLOWERS, A.M., LL.D., PRESIDENT OF THE UNIVERSITY.

H. CLAUDE HORACK, DEAN AND PROFESSOR OF LAW. Ph.B. 1899, State Univ. of Iowa; LL.B. 1900, State Univ. of Iowa; LL.B. 1904, Harvard Univ.; LL.D. 1937, Tulane Univ.; LL.D. 1939, Wake Forest College; Univ. of Wisconsin, 1904-07; State Univ. of Iowa, 1907-30; President, Iowa State Bar Assn., 1927-28; Member, Council of Legal Education and Admissions to the Bar of the American Bar Assn., since 1940, Adviser to Council, 1927-30; President, Association of American Law Schools, 1929; Duke Univ., since 1930; Dean, since 1934.

BRYAN BOLICH, PROFESSOR OF LAW. A.B. 1917, Duke Univ.; Duke Univ. Law School, 1919-21; B.A. 1923, Oxford Univ.; B.C.L. 1924, Oxford Univ.; M.A. 1927, Oxford Univ.; general practice, 1924-27; Duke Univ., since 1927.

JOHN S. BRADWAY, PROFESSOR OF LAW AND DIRECTOR OF THE LEGAL AID CLINIC. A.B. 1911, Haverford College; A.M. 1915, Haverford College; LL.B. 1914, Univ. of Pennsylvania; general practice, 1914-29; President, National Association of Legal Aid Organizations, 1940-41; Univ. of Southern California, 1929-31; Duke Univ., since 1931.

THADDEUS D. BRYSON, PROFESSOR OF LAW. Emory and Henry College, 1889-90; Univ. of North Carolina, 1891-95; finished Law School, Univ. of North Carolina, 1895; LL.D. 1938, Emory and Henry College; general practice, 1895-1918; Solicitor, 20th Judicial District, North Carolina, 1908-16; Judge, Superior Court, North Carolina, 1918-26; Duke Univ., since 1927.

DAVID F. CAVERS, PROFESSOR OF LAW. B.S. in Econ. 1923, Univ. of Pennsylvania; LL.B., 1926, Harvard Univ.; general practice, 1926-29; Harvard Univ., 1929-30; West Virginia Univ., 1930-31; Visiting Professor, Yale Univ., 1936-37 (1st semester); on leave, 1940-41, as Visiting Professor, Univ. of Chicago; Duke Univ., since 1931.

ELVIN R. LATTY, PROFESSOR OF LAW. B.S. 1923, Bowdoin College; J.D. 1930, Univ. of Michigan; J.Sc.D. 1936, Columbia Univ.; general practice, 1930-33; Univ. of Vermont, 1923-27; Univ. of Kansas, 1934-35; Univ. of Missouri, 1935-37; Duke Univ., since 1937.

CHARLES L. B. LOWNDES, PROFESSOR OF LAW. A.B. 1923, Georgetown Univ.; LL.B. 1926, Harvard Univ.; S.J.D. 1931, Harvard Univ.; general practice, 1926-27; Georgetown Univ. 1927-34; Duke Univ., since 1934.

DOUGLAS B. MAGGS, PROFESSOR OF LAW. A.B. 1922, Univ. of California; J.D. 1924, Univ. of California; S.J.D. 1926, Harvard Univ.; general practice, 1924-25; Univ. of California, 1926-27; Univ. of Southern California, 1927-30; Visiting Professor, Columbia Univ., 1928-29; Visiting Professor, Yale Univ., 1935-36 (2nd semester); Special Assistant to the U. S. Attorney General, 1938-39; Duke Univ., since 1930.

MALCOLM McDERMOTT, PROFESSOR OF LAW. A.B. 1910, Princeton Univ.; LL.B. 1913, Harvard Univ.; general practice, 1913-30; Dean, College of Law, Univ. of Tennessee, 1920-30; President, Tennessee State Bar Assn., 1920-21; Kosciusko Foundation Lecturer, Universities of Cracow and Warsaw (Poland), 1936-37 (1st semester); Duke Univ., since 1930.

J. DOUGLASS POTEAT, PROFESSOR OF LAW. A.B. 1923, Furman Univ.; LL.B. 1926, Furman Univ.; J.S.D. 1933, Yale Univ.; general practice, 1926-30; Professor of Law, Furman Univ., 1929-32; general practice, 1933-36; Duke Univ., since 1936.

WILLIAM R. ROALFE, LAW LIBRARIAN. LL.B. 1922, Univ. of Southern California; general practice, 1923-25; Law Librarian, Univ. of Southern California, 1927-30; Duke Univ., since 1930.

PAUL H. SANDERS, ASSOCIATE PROFESSOR OF LAW. A.B. 1931, Austin College; LL.B. 1934, Duke Univ.; general practice, 1934; Assistant to Director of National Bar Program, American Bar Association, 1934-36; Duke Univ., since 1936.

HAROLD SHEPHERD, PROFESSOR OF LAW. A.B. 1919, Stanford Univ.; J.D. 1922, Stanford Univ.; Dean, Law School, Univ. of Wyoming, 1922-23; Stanford Univ., 1923-30; Visiting Professor, Univ. of Chicago, 1929 30; Univ. of Chicago, 1930-31; Dean, School of Law, Univ. of Washington, 1931-36; Univ. of Cincinnati, 1936-39; President, Association of American Law Schools, 1941; Duke Univ., since 1939.

FRANK R. STRONG, VISITING PROFESSOR OF LAW, 1940-41. B.A. 1929, Yale Univ.; LL.B. 1934, Yale Univ.; Univ. of Del., 1929-31; State Univ. of Iowa, 1934-37; Ohio State Univ., since 1937.

MARY S. COVINGTON, RESEARCH LIBRARIAN. A.B. 1905, Shorter College; LL.B. 1922, George Washington Univ.; general practice, 1924-30; Duke Univ., since 1930.

The Law School of Duke University

The Law School of Duke University is a member of the Association of American Law Schools and is on the list of "Approved Law Schools" of the American Bar Association. The course of study provided covers the wide and varied range of subjects found in other national law schools. The training given is designed to prepare lawyers for practice in every state, and in the carefully-selected student body there now are students from 31 states and 56 institutions.

Emphasis is placed on individualization in instruction which is made possible by the size of the law faculty, listed inside the back cover. The proportion of full-time faculty members to students is exceptionally high. Under faculty supervision, members of the third-year class conduct a Legal Aid Clinic for the indigent, and this, together with an active Student Bar Association organized along the lines of state associations, serves to acquaint students with the problems and ethical responsibilities of the profession. The Association publishes a Journal which affords an opportunity for student training in law review writing.

The Law School occupies a building constructed on the Duke University campus in 1930. Its well-rounded law library, with a collection of over 60,000 volumes, is now the largest in the South. Ample living accommodations for law students are provided in the new Graduate Dormitory Center and in the recently completed log cabin group. The beautiful location in the Duke Forest and the healthful climate of the Piedmont section of North Carolina afford an excellent environment for intellectual work.

Students who have satisfactorily completed three years of undergraduate study at colleges or universities of approved standing are eligible for admission to the Law School. Information as to courses of study, probable expenses, and availability of financial aid will be sent upon inquiry to

THE DEAN, DUKE UNIVERSITY LAW SCHOOL
BOX C, DUKE STATION
DURHAM, NORTH CAROLINA